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The Sacred Way of Tibetan CRT Kung Fu: Can Race Critics Teach the Shadow's Mystical Insight and Help Law Students "Know" White Structural Oppression in the Heart of the First-Year Curriculum? A Critical Rejoinder to Dorothy A. Brown

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THE SACRED WAY OF TIBETAN CRT KUNG FU: CAN RACE CRITS TEACH THE SHADOW'S MYSTICAL INSIGHT AND HELP LAW STUDENTS "KNOW" WHITE STRUCTURAL OPPRESSION IN THE HEART OF THE FIRST-YEAR CURRICULUM? A CRITICAL REJOINDER TO DOROTHY A. BROWN†

Reginald Leamon Robinson*

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Our language was created by, and limits us to, the reality created by our finite perceptions and the consensus precepts of our society. A new language is needed to describe a new paradigm of reality. . . . To find Truth we must look, not just outside of ourselves, but more concentratedly within.

—Ernest F. Pecci, M.D.¹

INTRODUCTION

In *Critical Race Theory*,² Professor Dorothy A. Brown rejects the quantum world in which I live,³ where ordinary people⁴ co-create⁵ the very racism that they experience.⁶ She embraces the traditional Critical Race Theory (“CRT”) perspective that *white*⁷ racism has been, and remains, a natural and permanent feature of American social life.⁸ In this

1. Ernest F. Pecci, *Foreword* to WILLIAM A. TILLER, *SCIENCE AND HUMAN TRANSFORMATION: SUBTLE ENERGIES, INTENTIONALITY AND CONSCIOUSNESS*, at xiii, xvii, xix (1997).

2. DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* (2003).

3. See generally JANE ROBERTS, *SETH SPEAKS* (1994); JANE ROBERTS, *THE NATURE OF PERSONAL REALITY: A SETH BOOK* (1999) [hereinafter ROBERTS, *PERSONAL REALITY*]; MICHAEL TALBOT, *MYSTICISM AND THE NEW PHYSICS 3* (Arkana ed. 1993) (“Heisenberg stated that the observer alters the observed by the mere act of observation.”).

4. By ordinary people, I mean non-elite Asians, blacks, Indians, Latinos, whites, and women, including immigrants. See generally Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1363 n.9 (2004) [hereinafter Robinson, *Human Agency*] (defining ordinary people to mean “non-elite Asians, blacks, American Indians, Latinos, whites, and women, including immigrants”).

5. See 3 LEE CARROLL, KRYON—*ALCHEMY OF THE HUMAN SPIRIT: A GUIDE TO HUMAN TRANSITION INTO THE NEW AGE* 76 (1995) (“For to co-create means that you and Spirit and those around you create your own reality.”); AMIT GOSWAMI ET AL., *THE SELF-AWARE UNIVERSE: HOW CONSCIOUSNESS CREATES THE MATERIAL WORLD* (1993).

6. See, e.g., ROBERT E. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 34 (1972) (“The mind, in short, works on his block of stone. In a sense, the statue stood there from eternity. But there were a thousand different ones beside it. The sculptor alone is to thank for having extricated this one from the rest.”); see also Reginald Leamon Robinson, “Expert” Knowledge: *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145 (2000) [hereinafter Robinson, “Expert” Knowledge]; Reginald Leamon Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1441 (2001) (book review) [hereinafter Robinson, *Poverty*].

7. At this author’s request, and contrary to the policy of the *Journal*, white and black will not be capitalized throughout this Article.

8. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); see also *CRITICAL RACE FEMINISM* (Adrien Wing ed., 2d ed. 2002); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2002); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé

world, the Law and liberal legalism serve white race consciousness⁹ and its attendant unconscious racism,¹⁰ thus rationalizing why whites hegemonically dominate blacks, and thereby justifying why poor whites continue to cast their lot with white elites.¹¹

Critical Race Theorists ("Race Critics") also argue that white racism is an independent, structural force that befalls ordinary people like minorities.¹² It is an external, objective social reality¹³ that works against racial and ethnic minorities.¹⁴ Worst of all, as an external, objective reality, minorities have marginal, if any, control over *white* racism.¹⁵ It victimizes these minorities, operating visibly and invisibly, even where public laws prohibit racial and gender discrimination.¹⁶ *White* race consciousness and unconscious racism damage minorities, causing them to lose social and economic opportunities¹⁷ and inflicting destructive stereotypes on them.¹⁸ To end this loss and suffering, Race Critics use the Law to promote racial

Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY* (Crenshaw et al. eds.); *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002)].

9. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988), reprinted in BROWN, *supra* note 2, at 27–38.

10. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), reprinted in BROWN, *supra* note 2, at 12–26.

11. Crenshaw, *supra* note 9, at 27–28.

12. See, e.g., Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) ("[T]hus the framers, while speaking through the Constitution in an unequivocal voice, at once promised freedom for whites and condemned blacks to slavery").

13. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 16 (1984) ("['S]tructure' here appears as 'external' to human action, as a source of constraint on the free initiative of the independently constituted subject."); see also BARBARA MARCINIAK, *PATH OF EMPOWERMENT: PLEIADIAN WISDOM FOR A WORLD IN CHAOS* 3 (2004) ("Expanding your mind to penetrate the deeper meanings of life is not only liberating, it is crucial to your well-being, for knowledge is power, and how you use your power inevitably determines the course of your personal and collective life.").

14. See generally ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921—RACE, REPARATIONS, AND RECONCILIATION* (2002); JOE R. FEAGIN & HERNÁN VERA, *WHITE RACISM: THE BASICS* (1995).

15. See generally Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

16. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. §§ 2000a–h (2000)).

17. See generally DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999) (examining the race–class link that explains the persistent wealth gap between blacks and whites).

18. See generally Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

justice and legal equality.¹⁹ Toward this end, they purportedly developed in their writings and pedagogy a “mystical” way of knowing the heart of the Law or the first-year curriculum. The heart pulses with *white* racism and *white* race consciousness.

In their minds, Race Crits consider themselves Lamont Cranston, the hero in *The Shadow*. In *The Shadow*, a once popular pulp comic and television series, Cranston, as the Shadow, possessed a mystical insight by which he knew the evil that lurked in a person’s heart.²⁰ Cranston acquired this gift during his decadent wanderings in Tibet.²¹ Armed with this gift, and perhaps a moral obligation to use it wisely, the Shadow fought evil and preserved good.²² By exposing heart-hidden evil, he revealed its incorrigible ways. By using this gift, the Shadow sought to save the world from Shiwan Khan, who wished to conquer it.²³

In *Critical Race Theory*, Brown, like most Race Crits, would consider herself as gifted as the well-trained disciple of the Sacred Way of Tibetan CRT Kung Fu. To this extent, she’d be like Lamont Cranston who, during his decadent wanderings in Tibet, was taught by Tibetan Master Monks in the Sacred Way. Yet, while she and other Race Crits have the gift, they fear using it. By refusing to complicate their Newtonian determinism with quantum physics,²⁴ it is clear that they have not completed their training in the mystical arts. Consequently, like a disciple who leaves the Temple too soon or who refuses to “see” the Spirit behind all matter, Brown can only show law students one side of social life—the structure. It is like a student who has trained in ShaoLin Kung Fu, learning the forms, but not Chi—the internal energy that gives the forms their power. By pointing to structure, Brown cannot imagine the human being’s consciousness, her Chi, to co-create social events and experiences into life. Yet, by writing *Critical Race Theory*, she declares that law students need to know mere forms without regard to Chi, the source of the Shadow’s mystical insight. To this degree, Brown’s *Critical Race Theory* suggests that she has acquired the mystical skill of the fictive Tibetan Monk Masters who once instructed Cranston. Thus Brown, a false Master, claims to know that *white* racism, the Shiwan Khan of

19. See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85 (1994), reprinted in BROWN, *supra* note 2, at 2–9.

20. THE SHADOW (published 1931–49).

21. *Id.*

22. *Id.*

23. *Id.*

24. EVAN HARRIS WALKER, THE PHYSICS OF CONSCIOUSNESS: THE QUANTUM MIND AND THE MEANING OF LIFE 20–24 (2000) (discussing Newton’s concepts of reality, which are based on his three laws of motion and law of universal gravity, and even though Newton believed in God, which was used by scientists in the late-nineteenth century to lay claim to describing how physical reality actually worked).

her day, visibly and invisibly exists in our social life.²⁵ For her, the Law serves this evil,²⁶ and when it does, ordinary people suffer.

Can Race Critics truly deconstruct the extant problem of racism? Can they share the Shadow's mystical insight with law students who, as disciples, would be like Lamont Cranston, especially after they have consumed the status quo paradigms and objective legal theories of the first-year curriculum?²⁷ Although their training would be incomplete, Race Critics can arguably accomplish this task. According to psychologist Jerome Bruner, authority figures can, by mere suggestion, help subjects "see" once rejected, irrelevant data.²⁸ Like Race Critics and the Shadow before them, law students can "know" this structural evil.

Therefore, if Tibetan Masters were instructing them, the Shadow's mystical insight would arguably enable future lawyers to "know" the evil heart of *white* racism. This evil practice has a social, historical, and political context, one infused with liberal legalisms (e.g., rule of objective, neutral laws). By "knowing" this evil, they perhaps are obliged, like Lamont Cranston, to eradicate it. At the very least, this "knowing" can enable those who possess it to alter the hiring practices of corporate law firms,²⁹ the selection

25. See generally BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER (Devon W. Carbado ed., 1999); Pat Cain, *Privileges and Stereotypes: A Commentary*, 3 J. GENDER, RACE & JUST. 659, 659-64 (2000).

26. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 707 (1995) [hereinafter Butler, *Jury Nullification*] ("Even if a judge wants to be neutral, she cannot, because, ultimately, she is vulnerable to an array of personal and cultural biases and influences; she is only human.").

27. See Taunya Banks, *Teaching Law with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443 (1992), reprinted in BROWN, *supra* note 2, at 113-17.

28. See ORNSTEIN, *supra* note 6, at 3:

At one point in the experiment, it was suggested to the observers that, although hearts are usually red, such usualness does not logically imply that they will *always* be red. With this new input extending their category system, some observers were then quickly able to see what was in front of them.

29. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493 (1996), reprinted in BROWN, *supra* note 2, at 54-77; Linda E. Davila, Note, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403 (1987), reprinted in BROWN, *supra* note 2, at 79-89; see also BROWN, *supra* note 2, at 90 n.5 (suggesting that white racism is an external, objective experience, Brown asked: "Have you ever seen discrimination—in any sphere—and done nothing about it? How did it make you feel? How many people paid for your silence?").

criteria for judges,³⁰ or the evidentiary scope for persistent disparate impact against historically disenfranchised people.³¹

In *Critical Race Theory*, Brown ably achieves one of her missions. She interrogates staid, doctrinal perspectives, apparently sharing the Shadow's insight with law students after they have presumably internalized the dominant narratives of the first-year curriculum. For this quintessential CRT interrogation, Brown's *Critical Race Theory* is an excellent textbook. It effectively illustrates how Race Critics identify, analyze, criticize, and deconstruct *white* structural racism. Based on CRT's traditional framework of social structure *versus* human agency, *Critical Race Theory* presents *white* structural racism as an objective, real world phenomenon, having an injurious impact on ordinary people of different races,³² genders,³³ classes,³⁴ and sexual orientations.

Critical Race Theory unfortunately endorses a traditional, structuralist framework,³⁵ one almost completely rejected by contemporary social theorists.³⁶ By endorsing a framework that ignores the degree to which ordinary people co-create their personal experiences and social realities, Brown confesses that she has not studied the internal arts, the Chi, the energy of life that flows through everything and everyone. As such, human beings must be empty things in time-space, waiting simply for a larger, greater force like

30. See Judge Ming W. Chin, *Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 ASIAN L.J. 181 (1997), reprinted in BROWN, *supra* note 2, at 90–95.

31. See, e.g., *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997), reprinted in BROWN, *supra* note 2, at 40–52; *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981), reprinted in BROWN, *supra* note 2, at 102–11.

32. See, e.g., *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), reprinted in BROWN, *supra* note 2, at 132–35; *Fisher v. Carrousel Motor Hotel, Inc.*, 414 S.W.2d 774 (Tex. Civ. App. 1967), reprinted in BROWN, *supra* note 2, at 130–32; see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998), reprinted in BROWN, *supra* note 2, at 179–98.

33. See, e.g., *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891), reprinted in BROWN, *supra* note 2, at 98–101.

34. See *id.*

35. See Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 142 (1984) (“[S]tructuralism in general consistently involves the reduction of apparently multiple and independent practices—the analogues of words—to elements within an ordered system.”). Even orthodox science after nearly four millennia has begun to go beyond thinking of the universe only in an objectively predictable series of phenomena that humans can observe. See GOSWAMI ET AL., *supra* note 5, at 60–62.

36. See, e.g., GIDDENS, *supra* note 13, at xvi:

[M]ost of the schools of thought [except structuralism and “post-structuralism”] emphasize the active, reflexive character of human conduct. That is to say, they are unified in their rejection of the tendency of the orthodox consensus to see human behaviour as the result of forces that actors neither control nor comprehend.

white structural oppression to act on them.³⁷ Accordingly, Brown must by necessity push minorities (i.e., human agents) to the background and into endnotes.³⁸ Robbed of the power to control their destiny by white structural racism, Race Critics would argue, minorities thus become little more than passive, physical objects on which white oppression acts.³⁹ It besets and victimizes them. Regardless of this presumed passivity, Brown's *Critical Race Theory* suggests false avenues by which law students, once armed with the Shadow's mystical insight, can eradicate racial injustice and promote legal equality. By exposing the working of what I have called white structural oppression, Brown invites law students to alter the way they learn the law and how they use it in narrative discourse.⁴⁰

Unlike Brown's *Critical Race Theory*, white racism, I argue, cannot exist in the quantum world in which I live. Racism *does* exist, but it is not white racism. In the boiling caldron of racism, everyone stirs the huge, social ladle.⁴¹ Racism's existence depends on ordinary people.⁴² By the time they

37. See WALKER, *supra* note 24, at 23. Walker explains that a deterministic theory of reality rejects a distinction between:

animate and inanimate forces, and banishes as superstition the supernatural forces lurking behind shadows that jump in the night. . . . [Newton's] mechanics showed that all forces, whatever their origins, have one effect: to accelerate the body they act on; and one cause; one origin: the presence of other objects that are otherwise inert except for their mechanical properties.

Id.

38. See, e.g., BROWN, *supra* note 2, at 9 n.2 (suggesting that an ordinary person can construct [i.e., have agency upon] another person's racial identity and that people co-create their own personal reality. Brown asked: "How can you be sure that you were having a discussion with someone of a different race?" when you last had a conversation about race).

39. See Robinson, *Poverty*, *supra* note 6, at 1441:

[N]either [*Black Wealth/White Wealth* nor *American Apartheid*] positioned blacks or minorities in the center of the human chemistry that co-created the social and economic inequalities in the first place. As such, both books relegated the co-creative subject to historical footnotes and partially interesting marginalia. . . . Despite the powerful sociological narratives that *Black Wealth/White Wealth* and *American Apartheid* represented, they described blacks and whites as action figures, all of whom were posed by the deft hand of social structures.

40. See Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (criticizing recent race writings because they focus not heavily on real world, material inequality, but on altering discourse); Kevin R. Johnson, *Roll Over Beethoven: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 717 (2004) (replying to Delgado's critique as an intergenerational communication problem).

41. Cf. GOSWAMI ET AL., *supra* note 5, at 59–60 ("When we look, the wave collapses instantly; thus the wave could not be in space-time. . . . There is no object in space-time without a conscious subject looking at it").

42. See, e.g., Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 728 (2003) ("Most African Americans, including southerners, did not engage in subversion. In fact, some blacks discouraged the tactic, because

start fighting against racism, ordinary people have already participated in making it,⁴³ for they have internalized a mindset on which they rely to reproduce a social life by their very day-to-day activities.⁴⁴ By consuming limited concepts of race and by reproducing this social life, they use their conscious ideas of racism to co-create this problem,⁴⁵ and they use social structures as they would serum-filled needles, delivering toxic ideas like racism to others, including their children.⁴⁶ Therefore, racism does exist, and everyone co-creates it.⁴⁷

Social structures exist too,⁴⁸ and their life depends on daily human practices. Just as corporations can only come to life through their boards

of legitimate concern about white backlash.”); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 88 (2000) (“One of the most formidable challenges was simply convincing blacks that the status quo of racial subordination and oppression was not natural and inevitable, but rather contingent and malleable.”).

43. See ORNSTEIN, *supra* note 6, at 24 (“All humans may agree on certain events only because we are all similarly limited in our very structure as well as limited in our culture. . . . [I]t is very easy for us to confuse our common agreement with an external reality.”).

44. See GIDDENS, *supra* note 13, at xxiii (“The repetitiveness of [day-to-day] activities which are undertaken in like manner day after day is the material grounding of what I call the recursive nature of social life.”).

45. Cf. GOSWAMI ET AL., *supra* note 5, at 60 (“Consciousness is the agency that collapses the wave of a quantum object, which exists in potential, making it an immanent particle in the world of manifestation.”); WALKER, *supra* note 24, at 22 (“This ‘classical’ picture of reality that he gave us had to be there in Newton’s mind before he stated any of his laws of motion. Indeed, his laws of motion are the product of his very clear understanding of the nature of reality.”).

46. See GIDDENS, *supra* note 13, at 21–22:

[A]wareness of social rules, expressed first and foremost in practical consciousness, is the very core of that ‘knowledgeability’ which specifically characterizes human agents. As social actors, all human beings are highly ‘learned’ in respect of knowledge which they possess and apply, in the production and reproduction of day-to-day social encounters.

Giddens applies this point to all human agents, which by necessity includes minorities. *Id.*

47. See Lawrence, *supra* note 10, at 322 (“We are all racists.”); cf. Sander H. Lee, *The Central Role of Universalization in Sartrean Ethics*, 46 PHIL. & PHENOMENOLOGICAL RES. 59, 61 (1985) [hereinafter Lee, *The Central Role of Universalization*] (“[E]ven after one has decided to always act as others demand, one must still continually remake the initial choice to every further act that one commits.”); ORNSTEIN, *supra* note 6, at 26 (“We never see the world *right-side-up*; we select from the input and construct our personal consciousness from what we have selected.”).

48. See GIDDENS, *supra* note 13, at 17:

I treat structure . . . as referring to such rules (and resources). . . . Structure thus refers, in social analysis, to the structuring properties allowing the ‘blinding of time-space in social systems, the properties of which make it possible for discernibly similar social practices to exist across varying spans of time and space and which lend them “systemic” form.

and their officers, structures cannot exist independent of human agents and their actions.⁴⁹ As a first principle, ordinary people reproduce the social life out of the contouring, but not deterministic, social structure,⁵⁰ and they experience this "structure" as a time-space phenomenon. When this phenomenon couples with history (i.e., time) and permanence (i.e., space), ordinary people treat racist experiences like an institution (i.e., American slavery) or a system (e.g., Jim Crow) as real, objective, and external experiences. They cannot accept that what they experience as historical and permanent depends on their attention, beliefs, and emotions.⁵¹ They cannot imagine that how they experience racism has anything to do with them. Accordingly, social structures "matter," and without ordinary people's core beliefs and purposeful actions, the social life on which CRT focuses could not exist.⁵² In this way, structure *and* agency work interdependently and symbiotically;⁵³ neither exists without the other.

Through structure and agency, we all co-create racism. If so, each of us has acted irresponsibly. It would follow that whites cannot thus victimize minorities. Whites may engage in racially discriminatory practices. Aggregating practices in institutions can create and impose policies that disparately impact minorities. However, racial discrimination and institutional racism do not themselves victimize anyone. These practices deny women well-earned promotions, and they reject well-qualified minorities. Yet, victimization is an attitude, and it must be self-imposed.

49. *Id.* at 9. Although unintended consequences may follow, human agents engage in intentional action:

Agency refers not to the intentions people have in doing things but to their capability of doing those things in the first place. . . . Agency concerns events of which an individual is the perpetrator, in the sense that the individual could, at any phase in a given sequence of conduct, have acted differently. Whatever happened would not have happened if that individual had not intervened.

Id.

50. Anthony Giddens, *A Reply to My Critics*, in *SOCIAL THEORY OF MODERN SOCIETIES: ANTHONY GIDDENS AND HIS CRITICS* 249, 256 (David Held & John B. Thompson eds., 1989) ("Rather, existing only in and through human action, structure reveals *form* and *shape* to social life.").

51. See MARCINIAK, *supra* note 13, at 103:

Cultural beliefs about the nature of reality rule your experience from the deepest and most ancient levels. Beliefs arise out of ideas about reality; these ideas are then passed on through time to evolve into facts, and these appear to define what you see because of what you were told.

52. GIDDENS, *supra* note 13, at 3 ("To be a human being is to be a purposeful agent, who both has reasons for his or her activities and is able, if asked, to elaborate discursively upon those reasons (including lying about them).").

53. *Id.* at xxi.

Unfortunately, when ordinary people experience their co-created racism as victimization, they do not ask about its origins, its source. Generally, presuming that they already know that whites and institutional practices have caused this ugly experience, minorities internalize these feelings as real, visceral, and external to them, and therefore do not bother asking useless questions. With this sense of immediacy, they point accusing fingers. In their minds, whites victimize them, and they have a right to name their own reality.⁵⁴

To name a reality is to bring it into focus, to draw it to us. This naming depends on core beliefs and feelings. Ignorant of this power to name (or to speak a thing into existence), minorities co-create racism and decry it as victimization.⁵⁵ By blaming only *white* racism or *white* structural oppression, ordinary people like minorities overlook how their thoughts, imaginations, feelings, words, and actions correlate with personal experiences and social realities.⁵⁶ Like most people, minorities are fragmented thinkers, disconnecting their choices from the effects in their lives.⁵⁷ If they draw so-called racist experiences to themselves but view them as external, then they may feel helpless, wounded, and victimized. These feelings appear to intrude on them, an external thing that violates their personal boundaries. By engaging in fragmented thinking, they conclude that these experiences of racism have fallen upon them.⁵⁸ Experienced solely as an external, objective event, they angrily fight back:

54. See John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) (applying the "naming our own reality" tenet as a strategy for authenticity within legal academia); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 111 n.1 (1990) (establishing "naming our own reality" as a foundational tenet of Critical Race Theory scholarship); see also Robinson, *Human Agency*, *supra* note 4, at 1392-96 (discussing how Race Critics cannot properly apply the tenet of "naming our own reality" if they presuppose that ordinary people like minorities are unaware that white racism has determined their social and personal consciousness).

55. See MARCINIAK, *supra* note 13, at 91:

You are who you are, and you are where you are because of what you believe about yourself; no matter what you are experiencing, your beliefs form the underlying foundation to create these experiences. What are your beliefs? Where do they come from? Beliefs are usually about power: your power to create.

56. Cf. *id.* at 138 ("All of your beliefs have a powerful impact on your health, because how you feel about yourself and the world at large directly affects the functions and operating systems of your physical form.").

57. See generally DAVID BOHM, *THOUGHT AS SYSTEM* (1992).

58. ROBERTS, *PERSONAL REALITY*, *supra* note 3, at 46 ("It is the core belief which is strong enough to so focus your perception that you perceive from the physical world only those events that correlate with it."); MIGUEL RUIZ, *THE FOUR AGREEMENTS—PRACTICAL GUIDE TO PERSONAL FREEDOM: A TOLTEC WISDOM* 3 (1997) ("Attention is the ability . . . [to] focus only on that which we want to perceive. . . . [U]sing our attention, we can hold whatever we want to perceive in the foreground of our mind.").

suing,⁵⁹ pleading,⁶⁰ winning,⁶¹ or losing.⁶² But they rarely understand what they have helped to do to themselves.⁶³ With their core beliefs operating below their radar, minorities cannot imagine that they are co-equal co-creators in their experiences and realities.

Yet, core beliefs do govern how we live and fuel our day-to-day practices. Like acrylic paint on a magic-white canvas, these practices become the medium of our co-creation. To eradicate *white* racism, ordinary people must change what they believe, imagine, and feel because they help paint ugly experiences (e.g., white racism) and realities (e.g., victimization). To change how we co-create familiar, perhaps now normal experiences and realities, we must look within ourselves. We must first examine the extent to which racism operates in our own beliefs, imagination, and emotions.⁶⁴ Alas, through core beliefs and the co-creation principle, we victimize ourselves.⁶⁵

In New Age philosophy, the co-creation principle is fundamental.⁶⁶ Under it, ordinary people use their core beliefs to draw to them all

59. See, e.g., *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), reprinted in BROWN, *supra* note 2, at 132–35.

60. See, e.g., *Lee v. Hansberry*, 372 Ill. 369 (1939), reprinted in BROWN, *supra* note 2, at 323.

61. See, e.g., *United States v. Jones*, 242 F.3d 215 (4th Cir. 2001), reprinted in BROWN, *supra* note 2, at 230–34; see also *Hansberry v. Lee*, 311 U.S. 32 (1940), reprinted in BROWN, *supra* note 2, at 330–35 (ruling on procedural ground that *res judicata* did not bind property owners who did not wish to enforce racially restrictive covenants).

62. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996), reprinted in BROWN, *supra* note 2, at 199–206.

63. See ROBERTS, *PERSONAL REALITY*, *supra* note 3, at 74 (“Your emotions and your imagination both follow your belief. When the belief vanishes then the same emotional context is no longer entertained, and your imagination turns in other directions. Beliefs automatically mobilize your emotional and imaginative powers.”); see also Robinson, *Poverty*, *supra* note 6, at 1380–81 (discussing and explaining how thinking, talking, and acting can inform a person’s consciousness, and how they operate to confirm a person’s idea about the natural state of social reality like poverty).

64. Cf. NEALE DONALD WALSCH, *CONVERSATIONS WITH GOD: AN UNCOMMON DIALOGUE* 36 (1996) (“There is only one reason to do anything: as a statement to the Universe of Who You Are. Used in this way, life becomes Self creative. . . . For the experience you create is a statement of Who You Are—and Who You Want to Be.”).

65. *Id.* at 75:

The promise of God is that you are His son. . . . His equal. . . . You can accept . . . ‘His son,’ . . . but you recoil at being called ‘His equal.’ It is too much to accept . . . —too much *responsibility*. For if you are God’s *equal*, that means nothing is being done to you—and all things are created by you. *There can be no more victims and no more villains*—only outcomes of your thought about a thing.

66. See generally MARCINIAK, *supra* note 13, at 91–131 (discussing the powerful, intimate dance between beliefs and emotions in the fundamental principle of co-creation); *id.* at 91 (“Beliefs are usually about power: your power to create. Beliefs can reveal how you manage energy. Beliefs are decisions and agreements that you make about reality. . . . Beliefs are the programs from which you have built your life experience.”).

personal experiences and social realities, one of which is racism. To be human is to command the very elements of co-creation. This power to command is an indispensable element of human action. Without this power, ordinary people would be mere animals, having consciousness but no power to build or destroy the world. Consider just a few core beliefs: America hates Blacks; men belittle women; heterosexuals vilify gays and lesbians; the rich exploit the poor. To hold these core beliefs is to co-create them.

Co-creation requires powerful energy—emotions. If ordinary people ignite these beliefs with primary emotions like love or fear, they draw to themselves experiences that confirm these beliefs. Over time, these beliefs become conventions, and the experiences become shared ways⁶⁷ by which ordinary people assign meaning to words like “nigger,” to events like domestic violence, and to legislation like the Defense of Marriage Act.⁶⁸ To say that beliefs become conventions and that experiences take on shared meanings of value, I mean that ordinary people have internalized and externalized their inner, negative life.⁶⁹ By their very beliefs and feelings, they project their imaginations into social life.⁷⁰ By their very actions, they draw to themselves experiences and realities that confirm that they will suffer Driving While Black (e.g., hostile, presumptive *Terry* stops).⁷¹ By these very words, they announce to the Universe what they intend to co-create. Beliefs, feelings, actions, and words are to a co-creator what a hammer and nails are to a skilled carpenter.

In New Age philosophy, nothing constrains ordinary people because nothing constrains thoughts and emotions.⁷² Love and fear are our most powerful emotions. By using these emotions, ordinary people can co-create the violent, unfortunate experience that befell Jesse Byrd or a “heaven” on Earth—a more tolerant, cooperative world without racism.⁷³

As a practical matter, ordinary people who are not self-aware co-create even if they passively rely on limiting concepts like “race,” or

67. Cf. ORNSTEIN, *supra* note 6, at 39 (“Our ‘agreement’ on reality is subject to common shared limitations that evolved to ensure the biological survival of the race.”).

68. See GIDDENS, *supra* note 13, at 3.

69. See JERRY HICKS & ESTHER HICKS, ABRAHAM SPEAKS—A PERSONAL HANDBOOK TO ENHANCE YOUR LIFE, LIBERTY, AND PURSUIT OF HAPPINESS: NEW BEGINNING II, at 82 (1996) (“When you think of something you do not want, cancer, for example, and you feel the negative emotion that you term ‘dread’ or ‘fear,’ you have harmony—and that cancer is on its way into your existence.”).

70. See ORNSTEIN, *supra* note 6, at 34 (discussing how the sculptor projected her ideas and beliefs on the blank stone to carve (or bring) the statue into social life).

71. See *infra* CONCLUSION (discussing and quoting Paul Butler’s ideas on the Grand Puba).

72. See WALSCH, *supra* note 64, at 103.

73. See HICKS & HICKS, *supra* note 69, at 8 (“When you think of something you do want, perfect health, for example, and you feel the positive emotion of ‘peace’ and ‘joy,’ you have harmony—and that perfect health is on its way into your experience.”).

benign rulers, or salt-of-the-earth people.⁷⁴ Passivity belies victim or choiceless. Passivity does permit disempowering concepts to swirl around ordinary people. It is a choice, one implying power, to believe that "race" gives anyone an empowered identity. For Race Crits, passivity means structural disempowerment, and thus minorities cannot make such a choice. *White* racism's ubiquity robs them of any meaningful agency.⁷⁵ Yet, progressive sociologists argue that society enables *and* constrains choices.⁷⁶ It is a choice to act or not act.⁷⁷ Choice implies agency and personal responsibility, neither of which ordinary people can abdicate by pointing their fingers at the apparent ubiquity of racism.⁷⁸ Human history testifies to the inordinate, almost indescribable power of ordinary people. Self-aware human beings who embrace this idea allow their experiences to serve eventually as feedback,⁷⁹ so that they can make better, wiser choices.⁸⁰ Through passivity or self-awareness, ordinary people have played different roles—sometimes master or slave.⁸¹ In none of them will we find

74. Cf. Lee, *The Central Role of Universalization*, *supra* note 47, at 61.

75. See GIDDENS, *supra* note 13, at xxx ("A good deal of social theory, especially that associated with structural sociology, has treated agents as much less knowledgeable than they really are.").

76. *Id.* at 162–75 (explaining that structure enables *and* constrains).

77. *Id.* at 15:

[I]t is of the first importance to recognize that circumstances of social constraint in which individuals 'have no choice' are not to be equated with the dissolution of action as such. To 'have no choice' does not mean that action has been replaced by reaction (in the way in which a person blinks when a rapid movement is made near the eyes).

78. See generally WILLIAM GLASSER, *CHOICE THEORY: A NEW PSYCHOLOGY OF PERSONAL FREEDOM* (1998):

Choice theory explains that, for all practical purposes, we choose *everything* we do, including the misery we feel. Other people can neither make us miserable nor make us happy. All we can get from them or give to them is information. But by itself, information cannot make us do or feel anything.

79. See ROBERTS, *PERSONAL REALITY*, *supra* note 3, at 11 ("Interactions with others do occur, of course, yet there are none that you do not accept or draw to you by your thoughts, attitudes, or emotions. . . . In the most miraculous fashion you are given the gift of creating your experience.").

80. Lynne Duke, *Jane Fonda Has Exorcised Her Demons in Her New Autobiography*, WASH. POST, Apr. 5, 2005, at C1, C2 (Fonda writes: "The lessons we're supposed to learn gyrate around us over and over. It takes time before the lessons finally get internalized.").

81. Cf. ROBERTS, *SETH SPEAKS*, *supra* note 3, at 50–51:

Your own multidimensional personality is so endowed that it can have these experiences and still retain its identity. It is, of course, affected by the various plays in which it takes part. . . . Each actor must of himself realize, however, the nature of the production and his part in it.

victims.⁸² These roles give us experience, and with it, ordinary people will learn that passivity and self-awareness carry the task to use their co-creative power responsibly. Experience thus teaches them the depth of their human agency, a power that society can hinder but never destroy. In this power, ordinary people will reclaim the Shadow's mystical insight.

Although it is an excellent traditional CRT textbook, Brown's *Critical Race Theory* cannot teach law students the Shadow's mystical insight, so that they can "know" of *white* structural oppression at the heart of the first-year curriculum. Brown fails because she herself cannot imagine ordinary people as human agents who co-create their experiences and realities. Law students are ordinary people. They co-create everyday. They make choices that have consequences that flow not only from law school administration but also from self-confidence and self-esteem. For example, if a law student ignores an assignment deadline, she may have to work all night, going without sleep. Depending on the comparative quality of her work, she may do poorly. Regardless, it would be senseless to blame the professor, the dean, or her peers. Consciously or otherwise, students know as much. Thus, Brown cannot help law students reclaim their personal power to co-create a better society when she teaches them that larger social forces have uncontrollable power over their choices. And when *Critical Race Theory* focuses not on systems *and* agents, but on systems *versus* agents, she again ignores the power of students when CRT labels minorities as victims who need rescuing.⁸³ Like ordinary people, law students must learn that core beliefs and feelings co-create real world experiences. By conjoining systematic racism *and* core beliefs, law students can alter how they co-create their personal experiences (i.e., procrastination), thus illustrating how they have co-created racism too.⁸⁴ With this realization, ordinary people and law students will understand that external, objective reality has no more power than they willingly give it.⁸⁵ If Brown were to illustrate how social systems *and* human agency work

82. See, e.g., Philippe Bourgois, *Crack in Spanish Harlem: Culture and Economy in the Inner City*, 5 *ANTHROPOLOGY TODAY* 6-7 (1989) ("[S]treet-level inner city residents are more than merely passive victims of historical economic transformations or of the institutionalized discrimination of a perverse political and economic system. They do not passively accept their fourth-class citizen fate. They are struggling determinedly").

83. See generally ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999) (calling progressive legal scholars to join with political lawyers and community activists so that they attain a liberating, empowering racial justice).

84. See ORNSTEIN, *supra* note 6, at 26-27 (discussing how humans and animals learn to "see" even if scientists "reverse" how they "see." While they initially suffer some disorientation, they eventually acclimate. By inference, ordinary people can learn to alter their output and thus construct a new personal consciousness.).

85. See *id.* at 32 ("At each moment of each day, we make the same mistake as the double-seeing son—we consider that our own personal consciousness *is* the world, that an outside 'objective' reality is perfectly represented by our experience. Most people never realize there is an issue here.").

together, law students who learn to use the Shadow's mystical insight would perhaps reject status quo paradigms and objective legal theories.

Is Brown only teaching law students to think critically enough to vanquish their own racism and to rescue victimized ordinary people like minorities? If so, law students can acquire these critical faculties in a well-taught Real Property,⁸⁶ Contracts,⁸⁷ or Constitutional Law⁸⁸ course. To do more, Brown must risk herself by questioning CRT's theoretical nuggets and political positions that actually deny law students the Shadow's mystical insights.⁸⁹ She must unearth the long entombed micro-practices that undergird all macro-systems.⁹⁰ This revelation proclaims the truth: structure and agency have always enjoyed a long, unsunderable marriage. By insisting on a structuralist approach, Brown condemns law students to "know" mere pittance more than they did before enrolling in her CRT seminar, and she banishes them to a social reality in which they will grope hopelessly in the darkness, ever seeking the never-to-be-found external, objective structural forces that oppress ordinary people. In the name of *Critical Race Theory's* structuralism, the special, intuitive "knowing" that Brown intends to confer on law students dies aborning.

Therefore, *Critical Race Theory* cannot teach law students the Shadow's mystical insights. To be a structuralist is to be half blind. She'll teach them to "see" structures as the puppet master's hands deftly manipulate human beings who obey what the near invisible strings require them to do. To have this view of social life is to have no insight. Assuming that they venture deeply into the Law or the first-year curriculum, they will not see themselves co-creating their life experiences and social realities. They have been wrongly trained to ignore this information. When we

86. See generally RICHARD CHUSED, *PROPERTY: CASES AND MATERIALS* (2002) (taking a law and society approach).

87. See generally DEBORAH POST ET AL., *CONTRACTS: CASES AND MATERIALS* (2002) (using critical theory, race, class, and feminist approaches).

88. See generally PHOEBE HADDON ET AL., *CONSTITUTIONAL LAW: CASES AND MATERIALS* (2002).

89. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 435 (1930):

[A] realistic approach to any new problem would begin by skepticism as to the adequacy of the *received* categories for ordering the phenomena effectively toward a solution of the new problem. It is quite possible that the received categories as they already stand are perfect for the purpose. It is, however, altogether unlikely.

90. See Fredrik Barth, *The Guru and the Conjurer: Transactions in Knowledge and the Shaping of Culture in Southeast Asia and Melanesia*, 25 MAN 640, 651 (1990) (arguing for "[t]he cultural and interactional enablements and constraints that affect actors, with consequences that can be seen in the patterning of resulting acts and their aggregate entailments [M]icro-level where most of our anthropological observations are located, and the macro-level of institutional forms and historical processes, can be integrated."). See generally GIDDENS, *supra* note 13.

encounter human beings who engage in social life, especially if they appear to act against their interest, they will look for the puppet master. Not finding him, they will mutter something about false consciousness, or invisible privilege, or *white* structural oppression. They will ignore the degree to which core beliefs play any role in the ways in which ordinary people act.⁹¹ Regardless, ordinary people use their inner senses, particularly emotions, to co-create whatever law students hope to find at the heart of the first-year curriculum and the Law.⁹² After reading *Critical Race Theory*, law students, however sincere, cannot learn the skills to liberate their minds and to allow ordinary people to free themselves.

To be sure, Brown's *Critical Race Theory* undoubtedly will provoke students to think critically and analytically. In some form, every law school course does. Yet, does it provoke students to think outside of the "structuralist-blame-anyone-but-minorities" box? Does the book enable students, like the Shadow, to "know" what lurks in the heart of the first-year curriculum or the Law? If so, does Brown's *Critical Race Theory* require students to deconstruct social structures *and* ordinary people? This book does not. Despite Brown's attempt to infuse sincere law students with the Shadow's mystical insights by teaching them the Sacred Way of Tibetan CRT Kung Fu, Brown fails because, like other Race Crits, she remains deeply committed to a structuralist world in which external, objective, social forces make ordinary people powerless victims.⁹³

91. See GIDDENS, *supra* note 13, at 17 ("The most deeply embedded structural properties, implicated in the reproduction of societal totalities, I call *structural properties*. Those practices which have the greatest time-space extension within such totalities can be referred to as *institutions*."); Wilkins & Gulati, *supra* note 29, at 59–60:

Regardless of the cause [of white discriminatory practices against blacks], however, unless we have reason to believe that corporate law firms are immune to attitudes and beliefs prevalent in the rest of society, it is likely that a non-trivial number of whites working in these institutions hold some of these views [of white superiority].

Cf. ROBERTS, SETH SPEAKS, *supra* note 3, at 41 ("You do not realize that you create your larger environment and the physical world as you know it by propelling your thoughts and emotions into matter—a breakthrough into three-dimensional life. The inner-self, therefore, individually and en masse, sends its psychic energy out, forming tentacles that coalesce into form.").

92. See ROBERTS, SETH SPEAKS, *supra* note 3, at 25 ("Using the inner senses, we become conscious creators, co-creators. But you are unconscious cocreators whether you know it or not."); cf. GREGG BRADEN, *THE ISALAH EFFECT: DECODING THE LOST SCIENCE OF PRAYER AND PROPHECY* (1999) (arguing that the power of prayer has been lost through Biblical politics and that we can learn to co-create through prayer, visualization [i.e., imagination], and *emotions*).

93. See Robinson, "Expert" Knowledge, *supra* note 6, at 180 ("[B]y assigning blame and responsibility to whites for black experiences, blacks have abdicated their *powerful* agency. By and large, blacks operate like *impotent* victims. As such, they have consigned themselves to waiting for help, for recognition, and for justice. . . . [B]lacks must accept that they co-create racialized experiences.").

Part I of this Article uses a quasi-parable, in which Dorothy Brown is a Tibetan Master who teaches law students CRT Kung Fu, the monastic fighting skills by which they will acquire the Shadow's mystical insight to "know" the heart of the first-year curriculum. Part II challenges the organizing principles and content on which Brown's *Critical Race Theory* purports to critically interrogate traditional legal doctrine, applying a New Age Philosophical critique as well as agency theory to crack dealing in Spanish Harlem. I use this case study to argue that crack dealers deliberately and purposefully choose extra-legal economic opportunities, even at the expense of their neighbors and community. The Conclusion demands that Race Crits think outside of the *white* structural oppression logical box.

I. CRITICAL RACE THEORY: TEACHING THE SACRED WAY OF
TIBETAN CRT KUNG FU AND HELPING LAW STUDENTS "KNOW"
WHITE STRUCTURAL OPPRESSION IN THE HEART OF
THE FIRST-YEAR CURRICULUM

A. *Teaching Mystical, Sacred Sight in CRT's
Tibetan Temple—A Quasi-Parable*

In *Critical Race Theory*, Brown, the CRT Master, guides and instructs law students in the Sacred ways of "knowing" that depend on a traditional CRT framework.⁹⁴ Can the Sacred Way of Tibetan CRT Kung Fu help these students "know" when "knowing" has little to do with "seeing"?⁹⁵ From the very beginning, Brown didactically pushes law students to embrace the structural sociology of CRT. CRT, an eclectic way, organizes diverging intellectual energies, acting as a unifying rubric under which different theories, values, and attitudes can arguably coexist. Despite this eclecticism, Race Crits (i.e., the Shadows) have a common purpose: use the Law, ironically the handmaiden to slavery and racial oppression, to promote racial equality. This purpose expresses itself through subordination questions: Does the rule of law subordinate the interest and concerns of ordinary people? If so, can Race Crits proffer a remedy?⁹⁶ Although these questions suggest a useful, practical methodology, do they help students "know" in a way that ignores the self-imposed oppression of ordinary people?

94. See Brooks, *supra* note 19, at 2–9.

95. See ORNSTEIN, *supra* note 6, at 44–45 ("[S]eeing is a process which takes place not *in* our eyes, but rather *with the help* of our eyes. It is a process that is constructed in the brain, one largely determined by the category and output systems of the brain.").

96. See Brooks, *supra* note 19, at 3 ("This methodology—called the 'subordination question'—entails a two-pronged inquiry that asks (1) whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns of racial minorities and (2) if so, how is this problem best remedied?").

Armed with this methodology, Race Critics posit that American society and its institutions are inherently racist. With a foreboding fatalism, some race theorists like Derrick Bell say that these features are permanent and hegemonic.⁹⁷ Armed with the Sacred Way's major premise, Race Critics say that this racism is substantively and procedurally ubiquitous.⁹⁸ First, society substantively inscribes minorities as inferior to whites.⁹⁹ Second, society procedurally constructs narrowing legal and cultural straits through which its narratives rationalize four social experiences: (1) why justice claims by ordinary people lack merit; (2) why they often must surmount a stricter standard of proof; (3) how policy X could never have caused effect Y;¹⁰⁰ and (4) when formal court rules can frustrate ordinary people's claim to equality. On these points, Brown's Tibetan journey ends.¹⁰¹ While many minorities continue to demand racial justice, some whites no longer utter the invective "nigger," and they struggle to cope with their own internalized core beliefs about race and oppression. For Race Critics, whites may not say, but they think, "nigger."¹⁰² In this way, society perennially and quietly entombs equality (i.e., justice) claims.

Yet, CRT has a vision of racial equality, one that may cope with structural forces like inequality.¹⁰³ That is, Race Critics, the Shadows, will

97. See, e.g., BELL, *supra* note 8.

98. See Brooks, *supra* note 19, at 4.

99. See *id.* (quoting Richard Delgado, who states "[b]y substantive racism I mean that which treats blacks and other nonwhite persons as though they were actually inferior to whites.").

100. *Id.* (quoting Richard Delgado, who states, "[a]t other times, racism takes on what I call a procedural cast. In these periods, there are fewer images, stories, and laws conveying the idea of black inferiority. . . . Instead, we promulgate narratives and rules that invalidate or handicap black claims.").

101. See generally BROWN, *supra* note 2, at 312–48 (discussing civil procedure and labeling it the most important part of the book).

102. See Crenshaw, *supra* note 9, at 33:

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it.

103. Brooks, *supra* note 19, at 6. Repudiating the symmetrical equality, asymmetrical equality "embraces racial differences [and] rejects the notion that all '[racial] differences are likely to disappear, or even that they should.' . . . Because asymmetrical equality celebrates racial diversity and multiculturalism and promotes the empowerment of people of color, it is most compatible with the various theories underlying CRT." *Id.* However, this notion of equality reinforces unitary ideas of race. "[A]symmetrical equality would require universities to use racial quotas, because this would diminish the extent to which university administrators could exercise discretion to deny people of color jobs." *Id.* Brooks thus endorses liberal formalism. ("Given the omnipresence and perhaps permanence of racism, race critics would probably not trust white decision makers to apply pluralistic rules fairly, or value the special circumstances and experiences of nonwhites.").

use the Law deliberately and purposefully to achieve racialized justice.¹⁰⁴ In so doing, Race Crits proclaim a great faith in what Karl Llewellyn called "paper rules" and "paper rights."¹⁰⁵ In a word, it is called "instrumentalism."¹⁰⁶

This instrumentalism pursues racial equality. In pursuing this end, Brown shows law students, who still indulge in doctrinal thinking and standard legal process, why racial equality and the "ideal" of our Constitution are consistent. Allowing for differences in race, class, gender, culture, and context, racial equality copes with the structural forces of institutional settings. By embracing differences and by redressing discrimination, this equality has holistic qualities, and it refuses to mandate that minorities must act like "whitey." Ordinary people thus need not be culturally white. The Constitution ideally eschews this demand too. Accordingly, Race Crits need law students to understand that racial equality (e.g., identity claims) is not the problem. *White* structural oppression based on race is the evil. Under this notion of racial equality, ordinary people like minorities simply wish to jettison not structural identities (e.g., race), but structural oppression (e.g., hegemonic racism).¹⁰⁷

After Brown talks about the instrumental use of the law to achieve racial equality, the training in the Sacred Way of Tibetan CRT Kung Fu can earnestly begin. By this time, the students have sat for hours, perhaps weeks. It is a slow, deliberate introduction. The rigors of this teaching require the students' unswerving focus and attention. Even if they have begun to shed their old, legalistic ways and to interrogate their core beliefs, Brown knows that they will nod from time to time. For this reason, she walks with her *Zanchin* (i.e., awareness) stick. It is her walking cane and whipping stick, and she will use it against their slumping backs if they nod and lose focus.¹⁰⁸ In a focused, concentrated meditation, the students can acquire the mystical insight. As a result of relentless oppression, ordinary people possess a special, almost mystical racism detector, and with this special sixth sense, they know the source from which it haunts: *whites* and *white* structural oppression.¹⁰⁹

Yet, Brown knows that these students still cannot "know." Without CRT's normal science, they can perhaps sense the invisible force of racism, but they cannot "know" the heart of the Law. They cannot become

104. See *id.* at 3 ("But most race crits continue to argue that the law has the potential to end racial injustice.").

105. See Llewellyn, *supra* note 89, at 447–53.

106. Brooks, *supra* note 19, at 8 (discussing Alan Freeman).

107. See *id.* at 6–7.

108. See *id.* at 7 ("[U]nlike White people, people of color 'are quick to detect racism, to distrust official claims of necessity and to sense a threat to freedom.'").

109. *Id.* at 7 ("[P]eople of color experience the institutional effect of racism and understand that the 'system' or the 'man' functions in a multitude of ways to contribute to their subordination.").

fighting monks. Yet, Race Critics ask: Can you see *white* racism even if the perpetrator harbors unconscious racism or embraces a *white* race consciousness? This koan¹¹⁰ thus remains an unsolved riddle.

To aid them to use CRT's physical forms, Brown reveals one additional principle: Race Critics trust their experiences. From their experience with *white* racism and dominant culture, Race Critics posit themselves as the victimized Other. By trusting their experiences with *white* racism, Race Critics can hear the "victim's story."¹¹¹ The Law values logic, but while logic organizes, experience permits a "knowing" that ferrets out institutional practices on which *white* racism culturally depends. If judges, lawyers, and politicians rely less on experience and more on logic, then they cannot "know" the degree to which *white* racism or *white* structural oppression operates against minorities. It is in this way, Race Critics would argue, that white institutional agents pursue a brand of justice that cannot really eradicate *white* racism. Unlike these judges, Race Critics, the Shadows, rely on their experience to "know" that *white* racism operates behind the façade of objective, neutral laws. In the heart of the Law, Race Critics "know" value preferences exist (i.e., white privilege). Realizing that law students still have not acquired this special, experiential gift, Brown sums up the elements of this principle: personal and social experience with discrimination give minorities, for example, not only a special voice, but also distinct normative insights.¹¹²

In *Critical Race Theory*, after establishing these principles, Brown uses a mantra to deepen the students' training: "be the structure, see the structure!"¹¹³ Yet, she warns, darkness sometimes hides in the light. "Deepen your meditation," she commands. She instructs the students not only to "know," but also to feel. "What else explains racist experi-

110. A koan is a riddle for which a single answer may not exist, but if it does, it is a counter-intuitive one. GOSWAMI ET AL. write: "Koans are the Zen Buddhists' tool for breaking through apparent paradoxes to transcendent solutions." GOSWAMI ET AL., *supra* note 5, at 57. For example, "Zen aspirant Daibai asked Baso, the Zen master, 'What is Buddha?' Baso answered, 'This mind is Buddha.' Another monk asked the same question, 'What is Buddha?' Baso replied, 'This mind is not Buddha.'" *Id.* at 57-58.

111. Brooks, *supra* note 19, at 8:

CRT consciously looks at the law from the perspective of nonwhites. It re-locates the source of truth and knowledge from the perpetrator to the victim, from the insider to the outsider. . . . [R]ace critics privilege the 'victim's story' because they believe that the extent to which white people can understand what it means to be a person of color is limited.

112. *Id.* at 8-9.

113. See BROWN, *supra* note 2, at 9-12 (illustrating how structural narratives like Aunt Jemima, the aloof Asian, and the lazy Mexican work to subjugate racial characteristics into a single subordinated legal category); see also Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994), reprinted in BROWN, *supra* note 2, at 126-30 (discussing Judge Posner's use of efficient and effective raced-code references in his recitation of *Wassell v. Adams*).

ences?" she asked telepathically. It is "unconscious racism"¹¹⁴ and "white race consciousness."¹¹⁵

For Brown, the writings of Charles Lawrence and Kimberlé Crenshaw are primers for neophytes; they immerse law students into the sacred techniques of high-level but practical intuition and deconstructive tools of the Sacred Way of Tibetan CRT Kung Fu. Without these techniques, almost anyone who is modestly eager or intellectually curious can "know" explicit *white* racism. But can these disciples "know" when *white* racism has walked invisibly across rice paper?¹¹⁶ At this level, it is an intuitive art form.¹¹⁷ Thus to "know" the way of the Tibetan masters like Brown, and to acquire the mystical insight of the Shadow, law students need sacred, intuitive training. Using shared cultural experiences that are filtered through Freudian psychoanalysis and cognitive learning theory, these neophytes can use Lawrence's "cultural meaning test" to detect "unconscious racism"¹¹⁸ and they can apply Crenshaw's surgical critique to "white race consciousness" to expose how cultural experiences rationalize black oppression.¹¹⁹ With these primers, students can ask why hegemonic *white* racism still exists,¹²⁰ reinforcing the mythology of white superiority and black inferiority,¹²¹ even though Congress has enacted antidiscrimination laws.¹²²

114. See Lawrence, *supra* note 10, at 12–26.

115. See Crenshaw, *supra* note 9, at 27–38.

116. KUNG FU (ABC Television, 1977) (Qui Chiang Kang, albeit an adept, had to walk the rice paper in a particular way, a way acquired through years of disciplined training, before he could make his physical presence undetectable—invisible!).

117. See Lawrence, *supra* note 10, at 21 ("It is important to pay heed to one's intuitions at this juncture.").

118. *Id.* ("One individual's gut feelings is hardly conclusive evidence of cultural meaning, but such feelings often derive from feelings that are more widely shared, and they may well indicate that more substantial testimony is available.").

119. Crenshaw, *supra* note 9, at 31. ("White race consciousness also played a role in the nascent labor movement in the North. Labor historian Herbert Hill has demonstrated that unions of virtually all trades excluded Black workers from their ranks, often entirely barring Black employment in certain fields.").

120. *Id.* at 33:

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared. . . . Nor have the negative stereotypes associated with Blacks been eradicated. The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have not been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.

See also Bourgois, *supra* note 82, at 6–11 (explaining that ordinary people pay a heavy price for not conforming to dominant norms—getting pushed out of the mainstream and foregoing the social rewards that come with conformity).

121. See BROWN, *supra* note 2, at 29.

122. See Wilkins & Gulati, *supra* note 29, at 55. They write that since 1954, America:

To this degree, these new disciples of Tibetan CRT Kung Fu can use the "cultural meaning test" to ferret out *white* race consciousness. Based on CRT's major premise, this consciousness must always be "there." Like a heavy, deadly gas, this consciousness, the source of *white* structural oppression, creeps low to the ground, perhaps completely undetected by the sleeping innocent; but it is "there." To adopt CRT's style of the Sacred Way, those law students who are adept at CRT Kung Fu, whose minds are ever clear and vigilant, never sleep so silently that they cannot "know" intuitively the degree to which *white* race consciousness, albeit unconscious, silent, and invisible, disparately impacts ordinary people. By becoming trained in the Sacred Way of Tibetan CRT thinking, by meditating on the way unconscious racism works deftly with *white* race consciousness, and by inculcating sacred, intuitive learning of the cultural meaning test, Brown can prepare these law students for the real work of acquiring the Shadow's mystical, sacred insights—"knowing" the *white* structural oppression in the heart of the substantive, first-year curriculum.

B. *"Knowing" the White Structural Oppression in the Heart of the First-Year Curriculum—A Quasi-Parable Continues*

"Be the structure, see the structure," she cried. Yet, it is not enough. In theory, like Lamont Cranston, every law student has a gypsy-like nature, wandering through life and professional training so that she can learn to "be" and to "know" the structure of *white* racial oppression. Some of us abide the expression: "I'll see it when I believe it."¹²³ Some do not! However, Brown and Race Crits never ask if a student becomes the structure by believing in it before she sees *white* structural oppression. Is she co-creating it?¹²⁴ Or has she acquired the Shadow's mystical ability to "know" intuitively only what already exists in the heart of the Law?

By the end of the third chapter and very important clarifying notes, Brown tests these law students' desire to intuitively "know" the heart of the first-year curriculum, of the Law. It is a simple start. It is a compelling

has made substantial progress toward eradicating the kind of overtly racist policies that excluded blacks from virtually every desirable sector of the economy. For many blacks, these changes have produced a dramatic growth in income and opportunity. In recent years, however, it has become painfully clear that simply dismantling America's version of apartheid has not produced economic parity between blacks and whites. Although poor blacks have benefited the least from the civil rights revolution, "high level" jobs in business and the professions have also proved surprisingly resistant to change.

Id.

123. ORNSTEIN, *supra* note 6, at 2.

124. See ROBERTS, PERSONAL REALITY, *supra* note 3, at 26 ("Creation and perception are far more intimately connected than any of your scientists realize. It is quite true that your physical senses create the reality that they perceive.").

and practical, or perhaps praxis, lesson in revisiting the first-year curriculum and in deconstructing the law students' doctrinal education. To help them stay focused on why she required them to surgically invade their memories of the first-year curriculum and its doctrinal education, Brown shouts: "It is the structure, damn it!" The quizzical look disappears from their faces.

With structure firmly planted in their minds, she asks: "Why are so few minorities in corporate law firms?" It is a deceptively simple question.¹²⁵ For these students, it is a chance to achieve "Satori."¹²⁶ Huh, not really!¹²⁷

According to Wilkins, Gulati, and Davila, in institutional settings like corporate law firms, attorneys engage in practices that steer minority associates at the hiring, grooming, training, and market skills phases. All of these institutional mechanisms may determine if a partner will mentor an associate, but people tend to train associates who mirror their own "faces" in the world.¹²⁸ (with her *Zanchin* stick at the ready, Brown could ask the meditating students at any moment if they can hear the footsteps of Masters Bell, Lawrence, Patricia Williams, and Crenshaw, some of the early proponents of the Sacred Way, who wrote: *The Training Manual in the Sacred Way of Tibetan CRT Kung Fu*).¹²⁹

It is clear that corporate law firms are very complex organizations in which associates face a host of challenges.¹³⁰ Unless they graduate Order

125. See, e.g., *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997), reprinted in BROWN, *supra* note 2, at 40, 51 ("Because the evidence was insufficient 'for a reasonable jury to have reached the challenged verdict,' the judgment of the district court is reversed and the case is remanded for entry of a judgment for the defendant.").

126. "Satori" means supreme understanding.

127. See *Mungin*, 116 F.3d at 1558 (Edwards, J., concurring in part and dissenting in part) ("I dissent from the majority's reversal of the jury finding of discrimination. Although a close question, there was sufficient evidence for a reasonable jury to have concluded that Katten Muchin intentionally discriminated against Mungin on the basis of race."); BROWN, *supra* note 2, at 53 (the *Mungin* jury facts: "There were six jurors and two alternates that were allowed to deliberate and vote. Seven of those jurors were African Americans.").

128. Wilkins & Gulati, *supra* note 29, at 68-69 ("[P]otential mentors have [biases] for protégés who remind them of themselves. Studies of cross-racial and cross-gender mentoring relationships in the workplace repeatedly demonstrate that white men feel more comfortable in working relationships with other white men. . . . [W]hite partners in law firms are no different.").

129. See BROWN, *supra* note 2, at 52 n.2 (discussing the *Mungin* decisions, Brown asks, "[h]ow would the application of Professor Lawrence's cultural meaning test change the result in the appellate decision?").

130. See Wilkins & Gulati, *supra* note 29, at 59:

To say that firms 'construct' their use of labor in a manner that disadvantages blacks sounds as if this conduct is merely racism in a more sophisticated form. [Critics make this charge.] [Yet, institutional racism and intentional racism] are nevertheless often closely intertwined. Thus, scholars who discuss

of the Coif from Harvard, Yale, NYU, Michigan, or Penn, they may have trouble getting jobs at major firms.¹³¹ On the other hand, using their race and their informal networks, white law students with average grades can get interviewed and perhaps hired.¹³² Once hired, but without proper mentoring by a partner, minority associates may have difficulty getting choice assignments on complex matters, unless partners, especially minorities, groom and mentor them.¹³³ Without mentoring, they have difficulty proving their proficiency,¹³⁴ and without passing this test,¹³⁵ partners will not groom them for partnership.¹³⁶ And if they make partner,

institutional racism generally assert that those who design and run institutions either fail to police discriminatory conduct by their subordinates and/or adopt facially neutral practices with at least the implicit knowledge (if not the express intent) that these practices will disadvantage blacks.

131. See Wilkins & Gulati, *supra* note 29, at 56–57 (“Traditionally, corporate firms have hired most of their incoming associates from elite law schools, such as Harvard and Yale. In addition, those who secure jobs in this sector often have other traditional signals of academic success, such as high grades, law review memberships, and judicial clerkships.”); Davila, *supra* note 29, at 81 (“Hispanic law school graduates also face a double academic standard. Major law firms are gradually opening up opportunities for minorities, but they usually only hire minority students with outstanding academic records who have worked on law reviews and attended top law schools.”).

132. See Wilkins & Gulati, *supra* note 29, at 63 (“[B]lack[s] on average have less access to influential contacts and informal networks that allow some other candidates to bypass the formal screening requirements.”); Davila, *supra* note 29, at 81 (“According to the *American Bar Association Journal*, ‘often white law students with average backgrounds are considered for positions when minority students with similar backgrounds are not.’”).

133. See Wilkins & Gulati, *supra* note 29, at 67 (“[O]nce an associate acquires a reputation as being well-trained, she will continue to receive training in the form of demanding work.”).

134. *Id.* at 68:

[A]n associate has to have mentors among the firm’s partners or senior associates who can provide the Royal Jelly of good training. Blacks consistently report that they have difficulty in forming these supportive relationships. . . . Sixty-eight percent of those [in our survey of Harvard law graduates] who did not find a mentor, including 79% of the post-1986 graduates, stated that this was a significant factor in their decision to leave the firm.

135. *Id.* at 73:

Successfully completing ‘difficult’ work assignments is the best way for an associate to signal her quality and therefore to demonstrate that she is worthy of training. Since partners are looking for associates who can work effectively with relatively little supervision, traits such as initiative, creativity, speed, and confidence are highly valued. The more risk-averse [a black associate is in completing her work], however, the more difficult it is to signal that [she] has these qualities.

136. See *id.* at 67:

Associates know that firms look for two things when they select partners: legal ability and marketing potential. An associate who has not been trained

these minorities may be non-equity holders.¹³⁷ However, those who become equity partners may be little more than Gunga Din water carriers, mere second-class, feather-weight players.¹³⁸

Alas, without mentoring, minorities adapt! "I'll take the litigation assignments," they might say.¹³⁹ In law school, minority students opt out of advanced corporate law courses.¹⁴⁰ Why take courses in practice areas where they stand little, if no, chance of making partner? Brown knows that while reading this work and others to the meditating students, they will get the point. After all, they are law students. Like minority law students, they will take risks, but not if the deck has been institutionally stacked against them.

In corporate law firms, *white* race consciousness stacks this deck against these associates, and this deck probably landed on Mungin, the Good Black. The *Mungin* jury thought so. The jury effectively met Master Lawrence's "it-is-in-my-gut test," thus intuiting that some other factor, more than likely race, explained Mungin's fate, especially after the jurors could compare the way Katten Muchin treated comparable white associates. If so, this jury more than likely applied Lawrence's cultural meaning test. Yet, some litigation assignments lead to partnership, and so minority associates may take that route. Unfortunately, many associates do not, preferring at the very least government work to corporate, institutional

cannot credibly signal either of these capacities. Training is the Royal Jelly that enables associates to develop the job-related skills partners expect to see in those who will be elevated to their rank.

137. *Id.* at 79 n.9. Black partners are not the same as white partners. Based on Wilkins' studies, Brown writes: "[S]ome law partners are more equal than others. At many firms there are equity partners who divide the profits—and share in the liabilities—of the firm and there are non-equity partners who are salaried employees like associates." *Id.* According to Wilkins, "[P]artners of color are concentrated in income rather than equity partnerships." *Id.*

138. *See id.* "[E]ven where they are equity partners, [they] are found most often at the bottom of the 'point' scale for determining not only income but influence. . . . [I]f firms do not begin to address the powerlessness of the average black partner, they are likely to lose these lawyers." *Id.*

139. *Id.* at 73:

[G]oing into litigation is a plausible strategy for maximizing a black lawyer's career prospects. As an initial matter, litigation has been the most successful avenue to partnership for black lawyers. Fifty-six percent of the black partners at elite firms specialize in this area. Moreover, the fact that law schools tend to concentrate on teaching litigation related skills may make black lawyers feel better prepared to become litigators.

140. *Id.* at 72 ("Only 14% of black partners work in general corporate practice, and less than 11% specialize in technical fields such as banking (6%), bankruptcy (2%), and tax (1%)."). Assuming that black associates view this small percentage as tokenism or isolation, they will specialize in litigation so that they can increase the chance of success. If they get negative signals during the recruitment process, black law students will engage in an avoidance strategy like opting out of advanced corporate law courses. *Id.*

racism.¹⁴¹ By adapting to what they perceive as poor mentoring, training, grooming, marketability, and thus partnership opportunities (i.e., institutional racism), are these minority associates also co-creating their exit from corporate law firms?¹⁴²

At this point, Brown has achieved oneness of mind with these law students. She is aided by very earthy rhythms. Masters Lawrence and Crenshaw rhythmically and hypnotically slam out heavy drumbeats. The sounds reverberate: "structure!" Still sitting *zazen*,¹⁴³ the students rock in unison: one body, one mind.

Holding up her right hand to change the beat to an urban funk-thump, Brown, the CRT Kung Fu Master, fingered slowly to a new chapter: *Torts*. "Does structure impact ordinary people, diminishing their status, their personhood, and their meaning?" she asked. In this instance, "structure will present itself differently," she warned. It is not just race, but it is the power to label, to categorize, and to narrow evidentiary proffers. "Who has this power?" she queried. Judges do, and as Holmes tells us, judges command public force.¹⁴⁴

To show them how judicial command and structural power work intimately, Brown points to *O'Brien v. Cunard S.S. Co.* and *Wassell v. Adams*. In *O'Brien*, an immigrant woman never consented to vaccination from the ship's surgeon. Having administered the shot, the judge ruled that the ship's surgeon did so without want of care. Thus, she had no negligence claim.¹⁴⁵ Indeed, she held her arm up. Not implying consent, she simply wished the ship's doctor to see that she'd already had this shot. Well, how would he know? She was in line. Her arm was jutted out.¹⁴⁶ In *O'Brien*, the court labeled her behavior as giving implied consent. It categorized

141. See *id.* at 54-77.

142. See *id.* at 68. Associates who do not find themselves on the training track have three options: (i) they can leave immediately; (ii) they can attempt to move themselves onto the training track; or (iii) they can stay at the firm but invest their time and energy in developing non-firm-specific skills that will help them get another job.

143. Through true, tranquil sitting, or *zazen*, the discipline shines from the inside out, developing internal power and a great life force. By unifying the mind-body, the discipline finds her true self. With this self, she helps humanity. She becomes Bodhisattvas. Eventually, she acquires supreme understanding, Satori. See generally SHUNRYN SUZUKI, *ZEN MIND, BEGINNER'S MIND* (Trudy Dixon ed., 1970).

144. See Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897):

The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.

145. See *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891), reprinted in BROWN, *supra* note 2, at 100-01.

146. See *id.* at 99 ("If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been.").

her as a steerage passenger, all of whom were subject to vaccinations. Whatever was on her mind, she did not verbally object.¹⁴⁷ The court narrowed the evidentiary burden for the defendants; the ship's surgeon acted on her manifest behavior.

O'Brien, Race Critics would argue, represents differences in structural power. Brown told the students that power differentials, especially around class, gender, and race, have real meaning.¹⁴⁸ As instruments of state authority, judges can use their power to probe deeper and wider so that plaintiffs can tell their story, thus preventing traditional interpretations of evidentiary rules from reducing ordinary people and their values to mere doctrinal decision nodes.¹⁴⁹ By failing to appreciate the status difference between an Irish immigrant woman who was in steerage and who was dealing with an English Bostonian, the court views O'Brien and the ship's surgeon through the doctrinal lens of the reasonable person, rejecting her subjectivity and burdening her with the cost of miscommunication.¹⁵⁰

In O'Brien, Judge Knowlton could not see gender subordination. He presumed the naturalness of his institutional power and his male perspective. Power has this habit. Thus, in O'Brien, Judge Knowlton construes Mary O'Brien not as consenting under duress, but as simply failing to speak, thus "telling" the ship's surgeon to inject her. In the end, it is her burden, her cost.

Did I hear, "structure?" Brown shouted. I could hear her too. Though not entirely convinced, I do understand the intuitive teaching. From a male hegemonic perspective, Judge Knowlton and the ship's surgeon were of one "cultural" mind.¹⁵¹ He could relate to the doctor. "How's a man to read a

147. See *id.* at 99; *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981), *reprinted in* BROWN, *supra* note 2, at 102–11 (rejecting the Section 1983 claims for unconsented sterilization of Mexican women on the theory that the plaintiffs actually consented, even though some of them were in labor and even though they hired an anthropologist who conducted a study to better understand the cultural implications and impact of sterilization).

148. Banks, *supra* note 27, at 113–17 ("The question of miscommunication from gender, culture, or class differences are additional concerns, not usually covered in traditional first year subject casebooks.').

149. See Chin, *supra* note 30, at 91 (making a proportionality plea and perhaps associating diversity of race with sympathy for race-based claims).

150. See Banks, *supra* note 27, at 115:

[N]o serious attempt was made by the appellate court to consider the different power dynamics between the parties that resulted from the traditional subordination of women. No attention is paid to the fact that Mary O'Brien is a person seeking entry into this country and that the fear of exclusion from the United States has a powerful coercive aspect.

151. See *generally* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.').

woman's mind?" I could also hear the judge's private thoughts. Having the ability to speak, but failing to do so, the O'Brien court refuses *sua sponte* to draw on non-legal facts. It would not place Mary O'Brien against the background of society's hegemonic practices.

Status, for the court, was thus not the central issue; it was her legal pleadings.¹⁵² Beyond the evidentiary scope of the case, this court would not go. For Judge Knowlton, social structure would constitute non-justiciable claims. He'd brook no political, structural inquires. In the end, Mary O'Brien could read. She could speak. Doing neither well, the court would not delve deeper.

Unlike Judge Knowlton's oppressive, structural analysis, which ignored O'Brien's subject position, Judge Posner in *Wassell v. Adams*¹⁵³ delved too deeply, making Wassell personally responsible for the brutal rape that she suffered. It is a male judge who ignores male, hegemonic violence. In *Wassell*, Susan went to Chicago with her fiancé's parents for his graduation from Great Lakes Naval Training Station. They stayed at the Ric-Ron Motel, located near the Station, and a few blocks from a high-crime area. The Adamses, who owned and operated the motel, did not warn Susan, even though they had warned female guests in the past. After his parents left, she and Michael moved to a single room, where they spent Saturday night. On Sunday, Michael returned to the base for several days. While he was away, she would look for apartments where they would live after graduation.¹⁵⁴

Susan returned to her room, locked the door, latched the chain, and went to bed. A knock struck the door, awakening her. The television's built-in clock told her that it was 1 a.m. She saw no one through the peephole. Convinced that Michael had returned from the base and had gone to the Adamses to get a key so as not to wake her, she never looked through the clear pane glass next to the door. She unlocked the door. She was wrong.¹⁵⁵

At the door stood an unknown, but respectably dressed black man. He asked perhaps for "Cindy." Of course, she wasn't there. He then asked for a glass of water. She returned with the water, finding him sitting at the table. He tasted the cold water, feigning that it was too warm. He asked for money, but she said she had only \$20 in her car. After the man went to the bathroom to get a colder glass of water, Susan then got nervous. While the man was in the bathroom, nothing prevented her running out the front door. She didn't. Rather, she hid her purse with \$800 and car keys.

152. See generally BROWN, *supra* note 2, at 138–77 (discussing contract theory and unconscionability, where the parties may become relevant; yet, it depends on the context and what constitutes unconscionability and good faith).

153. See Kastely, *supra* note 113, at 126–30. See generally *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989), reprinted in BROWN, *supra* note 2, at 118–25.

154. *Wassell*, 865 F.2d 849, reprinted in BROWN, *supra* note 2, at 118–19.

155. *Id.*

Even if she had not run, Judge Posner suggested that she could have alerted the managers if she had triggered the alarm on the television by knocking it to the floor.¹⁵⁶

Minutes later, the man asked Susan to come into the bathroom, wanting to show her something. She refused. He later emerged from the bathroom naked below the waist. She ran from the room, beating on an empty, adjacent motel room. The man grabbed her. She screamed uselessly. The motel had no security guard; the owners lived in a basement apartment on the other side of the motel. Apparently no one heard her screams.¹⁵⁷

Back in the room, he gagged her and raped her for at least an hour. Once it was anally. To save herself, Susan convinced the man that she liked him. With his guard down, they showered together. Leaving the shower first, she got dressed and fled in her car.¹⁵⁸

The rapist was not caught. The police arrested a suspect, but Susan was too upset to identify him. At trial, the Adamses' attorney faintly tried to show that Susan consented to the rapes. At closing arguments, the attorney abandoned this tactic.¹⁵⁹

Like Mary O'Brien's vaccination, did Susan's rape happen because the Adamses failed to warn her about known risk¹⁶⁰ or because Susan, although a worldly and known woman, failed to run when she was first free to run? Later Susan, now married, sued in federal court, demanding damages of \$850,000. Like Judge Knowlton, the jury thought that Susan brought her ordeal upon herself, finding her ninety-seven percent negligent. Applying the comparative fault test in *Alvis v. Ribar*,¹⁶¹ the jury awarded her \$25,500 in damages.¹⁶² In response, Susan's attorney made two demands: (1) treat her innocent actions as immaterial, and (2) hold the Adamses liable for breaching their duty to warn. If the court agreed that the jury ignored the weight of the evidence, it could grant her a judgment as a matter of law or a new trial. The trial court refused; Susan appealed.¹⁶³

On appeal, Judge Posner rejected the duty to warn and her "country" innocence. In Illinois, the law forged little difference between simple

156. *Id.* at 119.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.* Before Susan's ordeal, the Adamses knew that a guest had been raped. Some years earlier, a sailor opened his door to two men who claimed to be "management," and they raped his wife. Guests also had been robbed, and an intruder had kicked into one of the rooms. *Id.*

161. *See Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981) (striking down the common law rule that contributory negligence was a complete bar to recovery in a negligence suit).

162. *See Wassell*, 865 F.2d 849, *reprinted in* BROWN, *supra* note 2, at 120.

163. *Id.*

negligence and “wanton and willful,” even though these words carry heavy meaning.¹⁶⁴ “Wanton and willful” simply mean “conscious disregard for . . . the safety of others.” Or they could mean that the motel owners’ “conduct posed a high probability of serious physical harm to others.”¹⁶⁵ Based on other cases, “wanton and willful” came to mean that the motel owners engaged in intentional misconduct, and if they were found liable for “wanton and willful” misconduct, they could not argue for comparative negligence.

Like Judge Knowlton in *O’Brien*, Judge Posner had little guidance on how to administer a new, flexible comparative negligence rule in Illinois. If Susan were not comparatively negligent, and if the jury ignored the weight of the evidence against the motel owners, she’d be entitled to a new trial, and the trial court had committed reversible error. Yet, if the jury concluded that Susan should not have opened the door and, after admitting the well-dressed rapist into the room, should have run for her life, especially after she got nervous, then the trial court had made two correct rulings: denying plaintiff a judgment as a matter of law, and refusing her a new trial.¹⁶⁶

But unlike Judge Knowlton, who didn’t go far enough into the class and gender context of *O’Brien*, Posner delved too deeply, noting that Susan, by her own testimony, was not naïve and provincial.¹⁶⁷ Posner described Susan as born in a small coal town, the ninth of ten children, and sexually abused by her stepfather.¹⁶⁸ Was Susan working out a deep, psychological issue when she opened the door at 1 a.m.? Why didn’t she look through the large, pane window? Why didn’t she run at her first chance? Why did she think about saving the \$800 and the car keys but not herself? If she was not naïve, was Susan a “known,” worldly woman? If she was not provincial, was she inappropriately trusting of black men, especially well-dressed ones? Given what the jury knew, why would it impose liability on the motel owners? Susan wasn’t naïve. Her provincial character, if it existed at all, was probably lost when her stepfather molested her. She knew the wicked ways of men, and she should have known that in the badlands, black men, even well-dressed ones, cannot be trusted in a white woman’s room at 1 a.m.

It would waste precious economic resources to use hindsight to say what Susan, this worldly woman, would have done if the motel owners had warned her. It is not that they didn’t have the legal duty; it is that she would have opened the door if she thought the visitor was her fiancé. Posner thought as much because he deferred to the jury’s decision, con-

164. See *id.* at 121.

165. *Id.* at 122.

166. See *id.* at 122–23.

167. See *id.* at 123.

168. See Kastely, *supra* note 113, at 127.

cluding that it was supported by the weight of the evidence. Having introduced her place of birth and her history of sexual molestation, Posner believed Susan invited her rape. "Everyone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night."¹⁶⁹ While the motel owners could have done more (e.g., hiring a security guard), it was Susan's sleep-induced mental lapse (and perhaps more) that made her ninety-seven percent responsible for her terrible ordeal.

Brown would argue that while Knowlton ignored the greater social context of male hegemony in which Mary O'Brien lived, Posner went too far to keep a jury verdict in place and to prevent a new trial. He faults the victim. "It is careless to open a motel or hotel door in the middle of the night without trying to find out who is knocking." Had Posner imposed his male perspective, no less than Knowlton did, by suggesting that careless, sexually experienced women like Susan should have known better? Susan thus is like Mary. Mary got in line, and she held her arm out. She could speak, but didn't. Susan opened the door after not looking through the large, pane window. After letting the stranger into her room before he became her attacker, she could have run, but refused to do so.

"What is a minority person's life worth?"¹⁷⁰ Brown asked. It was another simple, not-so-easy-to-answer question. Upon hearing the question, one student winced, breaking his mind meld with the bragging drums. He wanted to shout, "*white racism!*" But he feared he'd leave something out. "It is not a koan," she shouted. "But I digress." Hearing no answer, Brown raised her hand, signaling Masters Lawrence and Crenshaw to kick up the beat.

"*White racism,*" she began slowly, "ranks minorities below whites." American slavery legally ratified this racial order. While Jim Crow is dead, *white* race consciousness still permeates every feature of American social life. We're all infected with it.¹⁷¹ "Today, what's changed?" she asked. "Society still privileges whites over others!"¹⁷²

Brown, ever the consummate teacher, knew she had to get back to basics. "It is like poison," she pressed. Although odorless and colorless, it produces outcomes in society, in communities, and in children, just like Washington, D.C.'s current problem with lead in the drinking water. You seek an answer, and you can describe the effect, even though you don't

169. Wassell, 865 F.2d 849, reprinted in BROWN, *supra* note 2, at 124.

170. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) [hereinafter Lee, *Race and Self-Defense*], reprinted in BROWN, *supra* note 2, at 235–61.

171. Lawrence, *supra* note 10, at 322.

172. See, e.g., Lee, *Race and Self-Defense*, *supra* note 170, at 244–48 (discussing Bernard Goetz, who shot four black men, and, despite admitting that he intended to kill the men, was acquitted by a jury of assault, attempted murder, and reckless endangerment, and was only found guilty of illegal possession of a weapon).

yet know the *cause*. Meanwhile, society had organized itself around American slavery (e.g., “cause”) and later Jim Crow (e.g., “effect”). Whites, blacks, and others knew what the formal and informal rules were; they all abided.¹⁷³ Sometimes, confusion erupted into violence. Every now and again, a white man had to prove that he was closer to God than other folks by killing minorities. Ordinarily, sheriffs and judges looked the other way,¹⁷⁴ unless the story got out and the press showed up. Brown spoke slowly, almost hypnotically as if she were making closing arguments to a tense jury. “Just make my points clearly,” she thought; “they’ll do the rest.”

Brown pressed on: “After slavery fell and Jim Crow died with one foot out of the grave, *white* race consciousness did not simply go away.” Masters Lawrence and Crenshaw nodded at each other; they kicked up the beat just a notch. *White* people still kept to their ways; they simply hid them. They practiced them around “common symbols” like hiring practices.¹⁷⁵ Gradually, society began to question these symbols on which *white* race consciousness had relied to reassure itself that despite modern anti-discrimination regimes, whites still reigned over blacks and others.¹⁷⁶ Now, these symbols have to be shaped by an organizing structure. They have a

173. See, e.g., LEON LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998). Whites never tired of reminding blacks of what white society expected. “Niggers don’t sit with white folks down here. You must have come from ‘way up yonder.’” *Id.* at 217. “[T]hat’s what I’m here [for]—to tell niggers their places when they don’t know them.” *Id.* See generally GIDDENS, *supra* note 13, at 44:

Human agents or actors . . . have . . . the capacity to understand what they do while they do it. The reflexive capacities of the human actor are characteristically involved in a continuous manner with the flow of day-to-day conduct in the contexts of social activity. What agents know about what they do, and why they do it—their knowledge as agents—is largely carried in practical consciousness. Practical consciousness consists of all the things which actors know tacitly about how to ‘go on’ in the contexts of social life without being able to give them direct discursive expression.

174. See, e.g., MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 1* (1987) (describing the death of a black person who was dragged from jail and torn to pieces while the local sheriff and mayor looked on).

175. Lawrence, *supra* note 10, at 19 (“Repressed feelings and attitudes that are commonly experienced are likely to find common symbols particularly fruitful . . . as a vehicle for their expression. Thus, certain actions, words, or signs may take on meaning within a particular culture as a result of the collective use . . . to represent or express shared but repressed attitudes.”) (citations omitted).

176. See GIDDENS, *supra* note 13, at xxii (“Routinization is vital to the psychological mechanisms whereby a sense of trust or ontological security is sustained in the daily activities of social life.”); see also LITWACK, *supra* note 173, at 219 (“The idea of social equality was so abhorrent, so weighted with fears of racial impurity and degeneration, that the very suggestion of such equality had to be rigorously rejected and punished.”).

pattern. They have a social shape. They even have a contextual feel.¹⁷⁷ If a legal challenge disrupts these symbols, everyone knows something happened. Things just don't feel normal anymore.¹⁷⁸ This thing, somewhat invisible except when you look at outcomes, constitutes structure properties (e.g., institutional racism).¹⁷⁹

Brown continued: "It is also like the toxins in the water. It is there. It is affecting us all." By asking about hidden substances like *white* race consciousness and by developing a test like cultural meaning, we, the Shadows, can "see" how it affects us, all of us.

Brown placed her hand on *Critical Race Theory*, the Great Book, saying: "be the structure, see the structure." The students nodded collectively.

"Back to my questions," she noticed. "What is a minority person's life worth?" She didn't wait for a response.

She began her inquiry: "how would the criminal justice system respond?" A white man killed an old Vietnamese immigrant who worked as a cook in a restaurant. He butchered him to death, simply out of anger of a failed romantic interlude. He didn't expect to get away with it. The state helped him. The prosecutors assisted him in making a self-defense claim, even though he was represented by extraordinary counsel at the Public Defender Service. His counsel produced witnesses; the grand jury refused to indict him. He celebrated with Dom Perignon, exclaiming his cause for celebration: "I killed someone and got away with it!"¹⁸⁰

"What explains this outcome?" Brown asked.

Brown needed help. Masters Lawrence and Crenshaw had woven the melody of unconscious racism, *white* race consciousness, and the cultural meaning test into a very thick, rich drumbeat. Awashed in this didactic cadence, the disciples were supplementing their traditional analytical training with emotions, context, values, and experiences. Yet, a master drummer would make the learning experience holographic.¹⁸¹ Brown focused, placing an intuitive call to the master drummer.

177. Cf. BROWN, *supra* note 2, at 347 n.4 (citing Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992)) ("Even after *Brown*, official, city job announcements still required that applicants be White for the more favorable positions, including those in the uniformed services. . . . Between the time the first and second Black firefighters were hired, 170 Whites were hired in a city that was approaching a Black population majority").

178. Cf. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) ("[W]ith all deliberate speed").

179. See GIDDENS, *supra* note 13, at 17 ("In analysing social relations, we have to acknowledge both a syntagmatic dimension, the patterning of social relations in time-space involving the reproduction of situated practices, and a paradigmatic dimension, involving a virtual order of 'modes of structuring' recursively implicated in such reproduction.").

180. Davis, *supra* note 32, at 179.

181. See MICHAEL TALBOT, *THE HOLOGRAPHIC UNIVERSE* (1991).

Master Richard Delgado answered with a single, thunderous beat. "Blam!" Like two asynchronic heart cells coming together, this beat blended harmoniously with Master Lawrence's and Crenshaw's percussive tones. Together, they synched a story. It addressed Master Brown's question.

It did not begin with "in a time long, long ago, in a place far, far away," but it was compelling. With the drum skins screaming in unison, Master Delgado's syncopated beat pushed through to speak. The beat spoke her story majestically.

The beat said that the disciples needed the Shadow's mystical insight. Why? Rare is blatant racism. *White* racism's silent death can be intuitively felt; it leaves a pattern and practice.¹⁸² Unlike the old days when slave patrols acted openly and brutally or when a patrol officer wasn't too surprised that he ticketed more black than white motorists,¹⁸³ old world substantive racism today has fallen from its public pedestal.

Delgado's beat told with a throaty growl: yet, racism lives in the mind, the culture, the practices, and the Law. It is where new substantive racism shakes hands with its cousin: "a procedural cast."¹⁸⁴ Now, society produces stories about an expert kung fu Chinese man, so that a white neighbor could justify reasonable apprehension in his self-defense claims.¹⁸⁵ It packages Latinos as macho killers, so that even a deadly shot in the back looks like self-defense.¹⁸⁶ So prosecutors, jurors, and cops hear legal facts through stereotypes¹⁸⁷ and prejudices.¹⁸⁸

182. See, e.g., *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), reprinted in BROWN, *supra* note 2, at 269–75 (striking down a criminal statute that treated crack cocaine possession differently from powdered cocaine).

183. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998), reprinted in BROWN, *supra* note 2, at 206–08.

184. Brooks, *supra* note 19, at 4–5 (discussing Richard Delgado).

185. See Lee, *Race and Self-Defense*, *supra* note 170, at 253.

186. *Id.* at 255–56.

187. BROWN, *supra* note 2, at 277 n.8 ("not only is race used to identify criminals, it is embedded in the very foundation of our criminal law. Race helps to determine who the criminals are, what conduct constitutes crimes, and which crimes society treats most seriously.") (citing Dorothy Roberts, *Crimes, Race, and Reproduction*, 67 TUL. L. REV. 1945 (1993)). But see Bourgois, *supra* note 82, at 8:

[D]omination in the case of the inner city's culture of terror is self-administered even if the root cause is generated or even imposed externally. With the exception of occasional brutality by policemen or the bureaucratized repression of the social welfare and criminal justice institutions, the physical violence and terror of the inner city are largely carried out by inner city residents themselves.

188. See Lee, *Race and Self-Defense*, *supra* note 170, at 239:

Duncan found that when the person shoving was a Black person and the person being shoved was White, 75% of the subjects thought the shove constituted "violent" behavior, while only 6% characterized the shove as "playing

The beat's meaning was séanced. Society produces these stereotypes and prejudices. Who consumes these stories? Judges, prosecutors, and police officers drink them up and store them like a two-hump camel.¹⁸⁹ To be sure, we're all infected with *white* racism. Yet, when poor, average whites have quenched their thirst on these stories and have identified with elite interest, society gives them a pass for their crimes. So Hattori died from a blast in the chest; he didn't understand "freeze."¹⁹⁰ Chin died brutally, but not within the judge's ken.¹⁹¹ Du shot Harlins point blank, killing her instantly from a wound to the back of her head. But Judge Karlin suspended her sentence, placing her instead on five years probation.¹⁹² After all, Du was a concerned mother; Harlins was a gang-banger.¹⁹³ Where were the prosecutors?¹⁹⁴ What stories did the arresting police officer share with the prosecutors? Why did the prosecutor allow a white William Masters to tell different, perhaps competing stories until self-defense found its affirmative home?¹⁹⁵

With percussive splashes from Masters Lawrence and Crenshaw, Master Delgado's beat dramatically groaned on. When modern substantive and procedural racism play together, they serve broader, elite interests of which *white* race consciousness plays a key role. Material privations follow, all justified on racially hierarchical grounds. Society creates property rules,¹⁹⁶ conferring near property value on "whiteness."¹⁹⁷ They enforce

around." When subjects observed the same events with a White person as the shover and a Black person as the victim, only 17% characterized the White person's shove as "violent," while 42% described the White person's shove as "playing around."

189. See *id.* at 250.

190. *Id.* at 251.

191. See *id.* at 250–51, 254 ("The judge who sentenced the men who killed Vincent Chin by beating him with a baseball bat felt that what happened to Chin was not a brutal murder even though Chin's brains were splattered all over the sidewalk and his skull fractured in several places.").

192. See Reginald Leamon Robinson, "The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans, 67 S. CAL. L. REV. 15 (1993) (discussing Judge Karlin's probable justification for suspending Du's sentence after her conviction). See generally BROWN, *supra* note 2, at 261–78 (discussing criminal convictions and the problem of sentencing).

193. Lee, *Race and Self-Defense*, *supra* note 170, at 248–49.

194. *Id.* at 256 ("Racial stereotypes affect all people, including prosecutors, judges, and jurors. The Masters case is difficult because fear of crime and increasing gang violence are legitimate fears held by many people, particularly in Southern California.").

195. *Id.* Masters told the first police officers at the scene, "I shot him because he was spray-painting." *Id.* Later, Masters claimed he shot the boys in self-defense. In yet another explanation, Masters claimed that he shot the boys because they tried to rob him. *Id.*

196. See Joseph Williams Singer, *Legal Theory: Sovereignty and Property*, 86 Nw. U. L. REV. 1 (1991), reprinted in BROWN, *supra* note 2, at 292–97.

197. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993), reprinted in BROWN, *supra* note 2, at 279–87.

them; they alter them to suit powerful interests. Courts, banks, and real estate brokers support these rules and their regimes.¹⁹⁸ Thus the highest court of justice will ignore Native Indians' equity claims and favor "conquest."¹⁹⁹ It will deny their legitimate claims for compensation.²⁰⁰ Yet, in the interest of whites, especially so that they can continue to exploit migrant workers, courts will destroy, or greatly modify, common law doctrine, thus requiring that "property rights serve human values."²⁰¹

Brown stood up. Her raised hand quieted the piercing mantra flowing from Masters Lawrence's, Crenshaw's, and Delgado's drums: "be the structure, see the structure." Their energies withdrew from this grave, fundamental beat. Training in the Sacred Way of Tibetan CRT Kung Fu was nearing its end.

"How do we enter the heart of the Law?" Brown asked. "Are we not CRT Shadows?" she asked rhetorically. She smiled politely, but the drums' low thunder betrayed her easy countenance. The law students knew some lesson was pending. She did not hide her mission. Brown raised her hand again; the Masters' drum simmered to a low, guttural growl. Beyond the beat awaits an important procedural lesson.²⁰²

"Civil Procedure, that's the answer!" she exclaimed. These rules have substantive and procedural power, and Congress, politicians, and judges determine who affects what legal interest, who gets into court, and who gets to stay there.²⁰³ It is not enough to have legal rights. It is empty to pursue legal precepts like racial justice.²⁰⁴ As the interpreting institutions, courts must protect what statutes grant.²⁰⁵ However, when courts view legal rights through *white* race consciousness or when they grant standing through unconscious racism, ordinary people cannot vindicate those rights.²⁰⁶

198. See, e.g., Allen R. Kamp, *The History Behind Hansberry v. Lee*, 20 U.C. DAVIS L. REV. 481 (1987), reprinted in BROWN, *supra* note 2, at 336–43.

199. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), reprinted in BROWN, *supra* note 2, at 288–91.

200. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), reprinted in BROWN, *supra* note 2, at 297–304.

201. State v. Shack, 58 N.J. 297 (1971), reprinted in BROWN, *supra* note 2, at 305–33.

202. BROWN, *supra* note 2, at 312 ("Although this Chapter is the last in the book, it arguably is the most important.").

203. See generally Girardeau Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995); Girardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) [hereinafter Spann, *Pure Politics*].

204. See generally YAMAMOTO, *supra* note 83.

205. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

206. See, e.g., Spann, *Pure Politics*, *supra* note 203, at 1982–83 ("Supreme Court justices are themselves majoritarian, in the sense that they have been socialized by the dominant culture. . . . Accordingly, justices will come to the task of protecting minority interests possessed by the very predispositions that they are asked to guard against.").

Class actions are effective tools for advancing and vindicating those rights. Yet, while effective, they have a trap: *res judicata*. It is done. It is over. Even if you were not there, the court talked to you when it spoke to those before it.²⁰⁷ Now, in the old days, a person not a party to a final decision on the merits or not properly served was not bound by a decision. However, class actions are different. In this setting, Brown continued, some members of a class may bind others even though they were not named parties. Can the some bind the many that are unnamed in the action? Did the some adequately represent the many? Do the some have joint interest with the unnamed many?²⁰⁸

The punctuation in the CRT Master's last question stopped her pacing. The drums glowed with percussive rhythm. The disciples rocked to the sinking, deep bass, while they recited the mantra: "be the structure, see the structure."

Until recently, courts generally protected status quo interests over justice claims by minorities. Here's a case in point; it has been effectively overruled.²⁰⁹ Nevertheless, it is instructive of either *white* race consciousness or unconscious racism.

Let's consider *Martin v. Wilks*. The NAACP and black firefighters sued the city and the Jefferson County Personnel Board, stating that the defendants racially discriminated in hiring and promotion. The parties forged two agreements. Each required the court's final approval. Tentatively approving the decrees, the court ordered hearings. After the hearings but before the court finally approved the decrees, the Birmingham Firefighters Association ("BFA") sued, decrying the decrees' impact on their rights. The court rejected BFA's motion, saying that it was too late. It approved the decrees. BFA appealed, but rejecting this matter, the reviewing court thought that white firefighters could always file a Title VII claim in which they would point out how the decrees violated their rights. Yet, the white firefighters failed to show irreparable harm, the very basis for an injunction that would frustrate the decrees.²¹⁰

Based on the *res judicata* rule, blacks had acquired racial equality that pressed against white privilege and expectations. Not to be undone,

207. See BROWN, *supra* note 2, at 329 n.1 (discussing the *res judicata* principle).

208. ROY L. BROOKS, *CRITICAL PROCEDURE* (2002), reprinted in BROWN, *supra* note 2, at 312, 313–14; see *Hansberry v. Lee*, 311 U.S. 32 (1940), reprinted in BROWN, *supra* note 2, at 332 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

209. BROWN, *supra* note 2, at 347 n.5:

Congress responded to *Martin v. Wilks* by limiting challenges to employment discrimination consent decrees; see Civil Rights Act of 1991, § 108, codified in 42 U.S.C. 2000e–2(n). Now anyone who had notice and an opportunity to present objections to a consent decree or whose interests were adequately represented in an earlier challenge cannot object to the consent decree.

210. *Martin v. Wilks*, 490 U.S. 755 (1989), reprinted in BROWN, *supra* note 2, at 343, 344.

new white firefighters sued the city and the board. They said that the city and the board had denied white firefighters promotions, preferring instead less qualified black candidates. Under the decrees, the city admittedly used race-conscious remedies.²¹¹

Frustrated, a new group of white firefighters sued. This time, the white firefighters argued that they were denied promotions so that less qualified blacks could get a discriminatory benefit. The white firefighters concluded that this race-based remedy violated federal law. Again, the city and the board defended themselves, pointing out that they were adhering to the consent decrees. Black firefighters intervened so that they too could defend the decrees.²¹²

At trial, the city, the board, and the black firefighters asked the court to reject the white firefighters' reverse discrimination complaint because they were wrongfully attacking the consent decrees.²¹³ First, after the court provisionally approved the consent decrees and after directing the parties to notice potentially affected parties, the city published notices in two local newspapers. Second, at the fairness hearings, BFA objected to the remedial scheme, filing an amicus curiae. Third, after the fairness hearing, BFA and two of its members asked the trial court if they could become parties. They argued that the decrees would adversely affect their rights. Fourth, ruling that BFA's petition was too late, the trial court approved the decrees.²¹⁴

Again, the court rejected this action, holding that the decrees were a defense to employment discrimination. Yet, it did not address if, under the decrees, the city was required to promote black over white firefighters.²¹⁵

Brown paused. She stopped her reading of *Martin* and looked at her meditating students who were rhythmically vibing to Master Lawrence's, Crenshaw's, and Delgado's humming beats. She rapped her *Zanchin* stick against the stone floor. "Is Civil Procedure race neutral? *Res judicata* is neutral! Isn't it? It concludes rights, issues of fact, questions of law, for all parties and their privies. Isn't that right? If it is neutral, you'll look into the heart of the Law and 'know' that justice exists?" Brown spoke in a marching tone. "If not, then the critical rules are simply prisms through which unconscious *white* racism and *white* race consciousness organize, construct, and rule America's social life!" As Brown walked, she hammered the *Zanchin* stick against the stone floor. Each tapping clang joined fluidly with the masters' drumming. "Feel what I next say as if it were this sound now piercing your once still minds," she commanded.

211. *Id.* at 345.

212. *Id.*

213. *Id.*

214. *Id.* at 344.

215. *Id.* at 345.

The white firefighters appealed to the Eleventh Circuit, and it reversed the trial court. The appellate court ruled that *res judicata* did not bar these white firefighters. Neither parties nor privies, the trial court could not properly reject their reverse discrimination claim. Explicitly rejecting the doctrine of "impermissible collateral attacks," the appellate court stated that decrees cannot be cloaked with finality from challenges by nonparties. As innocent nonparties to the decree, the trial court could not force them to participate in a voluntary bargain in which these white firefighters' interests would either be ignored or sacrificed. Finally the appellate court returned the case to the trial court, requiring it to hear the white firefighters' reverse discrimination claim under the now governing, voluntary race-conscious plan.²¹⁶

Before the new trial, the black firefighters sought certiorari from the United States Supreme Court. It agreed with the appellate court. Citing *Hansberry v. Lee*, the Court validated an axiomatic principle of American jurisprudence: "one is not bound by a judgment *in persona* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."²¹⁷ Why? Everyone must have her day in court. While parties in dispute can resolve their issues, they cannot affect the rights of strangers. The white firefighters were strangers to the fairness hearings. They may have been aware of them. They could have chosen to object. Nevertheless, they were not parties; they were not served. Thereafter, these white firefighters have a right to attack the decrees, alleging reverse discrimination.²¹⁸

Brown, the Tibetan Master, closed *Critical Race Theory*, The Great Book. However well constructed by the Great Masters, she knew instinctively that The Great Book could provoke questions. It had no answers. Brown also knew that teaching law students to "see" *white* structural oppression could not replace their zeal for justice concepts like racial equality. No, they had to "see" and thus "know" by tapping into their mystical insight, a practiced skill borne of experiences with *white* racism and racial discrimination. Few of them had directly experienced this racism or discrimination, and even if they were standing right next to a black person who may have just suffered a discriminatory event, they might not "see" it. Deeply repressing their own *white* race consciousness, they may have lost the insight for subtle injustice. Unconscious racism can become a blinder.

"Did BFA object to the decrees because they'd be adversely affected? Would they lose a right?" she asked.²¹⁹ Brown stood still, tapping her *Zanchin* stick lightly against the stone floor.

216. *Id.*

217. *Id.* at 345-46.

218. *Id.* at 346.

219. BROWN, *supra* note 2, at 346-47.

One student raised her lowered chin. During her training in Tibetan CRT Kung Fu, she'd looked within herself. With her eyes still holding an internal gaze, she spoke in tones and rifts akin to Archie Shepp's fire music.²²⁰

She said: In *Martin*, these white men felt entitled to all uniformed service jobs. They'd come to expect that whiteness gave them a virtual entitlement, a kind of property. It was a presumption that they'd held to deny to blacks opportunities.²²¹ A voluntary decree threatened this property interest; perhaps it made them doubt their own whiteness, their own psychological security. By losing one uniformed services job, they perhaps felt that they'd lose everything.²²²

Yet, she said, in the abstract, none of this analysis makes sense. Birmingham represented a social system, a social life, into which whites and blacks had become vested. Within this system, each group perhaps worked to advance themselves.²²³ Each more than likely used whatever resources were at hand to improve her lot in life.²²⁴ Given the extant *white* racism, these white firefighters presumed that nothing short of hell freezing over would deny them their superior right to social authority, economic security, and political power. Likewise, blacks fought back, finally accepting that they'd have to risk everything to force a public, federal court issue. By challenging Birmingham's hiring practices, these blacks also questioned *white* supremacy, and they questioned the social system on which this supremacy as an idea had been produced and reproduced.

And so, the young disciple continued, Civil Procedure is an absolutely indispensable way into the heart of the Law. Yet, humans have paved this way with historical practices by which whites have come to justify and legitimize their special, privileged place in society. In these practices, we still find unconscious *white* racism and *white* race consciousness, and they infect not only torts, contracts, criminal law, and sentencing; a prosecutor's and police officer's discretion and jury prejudice; and property; but also every reasonable expectation and right that whites simply take for granted. Accordingly, when any one of us looks into the heart of the Law, we find that our sight has been prised by unacknowledged mindsets like

220. See Calmore, *supra* note 54, at 2129.

221. BROWN, *supra* note 2, at 347 n.5 ("Perhaps White firefighters were receiving preferential treatment in order to prevent qualified Black firefighters from being employed.").

222. *Id.* ("By the City deciding not to continue discriminating against Black [sic] firefighters, they were leveling the playing field. As a result there would be fewer White firefighters hired because they would no longer receive preferential treatment. As a result, the City would now be able to hire qualified Blacks.").

223. See Bourgois, *supra* note 82, at 6-7.

224. See GIDDENS, *supra* note 13, at 15 ("Resources (focused by signification and Legitimation) are structured properties of social systems, drawn upon and reproduced by knowledgeable agents in the course of interaction. Power is not intrinsically connected to the achievement of sectional interests.").

unconscious *white* racism and *white* race consciousness.²²⁵ However, these unnecessary prejudgments can be perhaps overcome by the cultural meaning test. By applying this test to outcomes that apparently flow from race neutral instruments, we can not only expose our own prejudices, but also our inability to use existing legal rules to promote justice concepts like racial equality.

"Quite right!" declared Brown. "You have begun to acquire the mystical insight of CRT Shadow." Nevertheless, Brown gave them a warning. She required them to remain vigilant, not just to society's practices, but also to their own. She told them that outside of the temple walls, they will encounter a host of structural issues that will beckon them to the apparent fairness of rejecting group remedies and punishing only individual bad acts.²²⁶ Thus she urged them to remember that while today's social racism looks somewhat different, it originated out of American slavery and the present impact of blatant past *white* race consciousness. Given that Congress has only recently committed itself to ending racial discrimination, *white* racism must remain the social practice that confounds racial equality today.

Brown hugged and waved farewell to her young disciples, and she said: "be the structure, see the structure."

II. THE HERETIC AT THE TIBETAN CRT KUNG FU TEMPLE GATES: HUMAN AGENCY AND UNEXAMINED MICRO-PRACTICES IN THE CULTURAL REPRODUCTION OF CO-CREATED RACISM

A. Heretics and Human Agency

Is it heretical²²⁷ to make ordinary people responsible for their personal experiences? That is, who co-creates reality?²²⁸ By reality, I mean my conscious awareness of my personal experiences with myself, others, and social life. From moment to moment, I actually have control over what I think, feel, say, and do. That is, I have awareness, and to the extent that I

225. See generally GORDON B. MOSKOWITZ, *SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS* 438–513 (2005) (discussing the impact on our perceptions of stereotypes and expectancies, whether conscious or unconscious, permitting us to use schemas to categorize information).

226. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

227. GARY ZUKAV, *THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS* 119 (1980) (explaining that visionary people expose illusion and live in lonely places, and, by so doing, are seen as heretics, nonsensical, and mad. Yet, they persist because they can share their vision meaningfully).

228. Cf. Robinson, *Poverty*, *supra* note 6, at 1387–88. Race Critics ordinarily don't ask these kinds of questions, unless they are raising a straw person so that they can easily blame whites and white racism.

am a conscious, sentient being, I ought to know that my thoughts and feelings not only co-create what I experience but also determine what I experience.²²⁹ My imagination reinforces these thoughts and feelings, and they get sufficiently anchored in this world by my words and actions. Basically, very few of us say and do things that don't dovetail into our core beliefs. In short, from a mass of possible, simultaneous realities, ordinary people select, sort, and construct what they experience.²³⁰

Here's a different, perhaps better way to understanding this point. Keep in mind the next second of your life. Imagine that this second is one breath. Can you determine what you do, think, say, and feel in this next second, this one breath? By answering yes, you're closer to becoming a master of your own reality. You can take personal responsibility for what happens in your life and how you affect others. By answering no, you're choosing to abdicate this level of responsibility and awareness to social forces, parental values, and personal experiences like racism.

When you aggregate these moments, seconds, and breaths, you have the unfolding of your entire life. In this life, you can choose to play either the master or the slave. Yet, never forget that you're playing the role. It is not real. In either case, you still have agency. Human agency simply means human action, and all action flows from conscious or unconscious choices. As such, you're not a victim, except in the way you've chosen to play out your roles—master or slave.

Is it heresy to speak this way about human life? Or am I introducing concepts of an empowered human being who can and will take personal responsibility? Since the advent of CRT, progressive race scholars have always talked about victims, especially structural victims, people who live and die at the whim of some external, objective force over which they have no control. Since I began writing about race consciousness, I have distanced myself from poisonous, debilitating ideas like white victimizer and black victimized. Instead, I have reconstituted and reconstructed all humans in their natural, normal roles: *powerful reality creators*. Now, ordinary people can take complete responsibility for co-creating their personal experiences and social realities. Some race scholars have complicated these roles by making them dynamic and fluid, suggesting that even victims can victimize.

229. See ORNSTEIN, *supra* note 6, at 18–19 (“Each of us selects and constructs a personal world in several ways. Our sense organs gather information which the brain can modify and sort. This heavily filtered input is compared with memory, expectations, and body movements until, finally, our consciousness is constructed as a ‘best guess’ about reality.”).

230. *Id.* at 17 (“We first *select* the sensory modalities of personal consciousness from the mass of information reaching us. This is done by a multilevel process of filtration, for the most part sorting out survival-related stimuli. We are then able to *construct* a stable consciousness from the filtered input.”).

Yet, in these complicated, more sophisticated ways of understanding this fluidity, scholars like Yamamoto still embrace the concept of victims and structural oppression. I reject such concepts, simply because they distract us from the real forces that undergird every personal experience and social reality—our beliefs, thoughts, feelings, imaginations, actions, and words. For those who have labeled me a conservative or a progressive colorblind scholar,²³¹ I am a heretic. For those who see past the distracting veil of the victim's consciousness, I am a legal ontologist who understands that a philosophy of self-empowerment, evolved ethics, and personal responsibility requires ordinary people to accept that they co-create their experiences and realities.²³²

We make the world in the fire of our imaginations, and so we can change it too by simply re-imagining what can be possible. Accordingly, in my world, it is heresy to speak of human gods as if they are victims, as if they have no choice, and as if they cannot promote an ethical world. It is thus heresy to deny our angelic human roles in the co-creation of our personal experiences and social realities. It is heresy to view ordinary people as anything other than free human agents. It is heresy to even suggest that human worlds, events, and experiences can exist without us. As Andrei Linde would say, without human consciousness, mother earth could not exist.²³³ We, all of us, have always been the powerful co-creators

231. See Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1457 (2002). Hutchinson further argues:

This trauma is evidenced by self-identification that rages against racism yet clings to concepts of race that make it possible in defining who we are. Robinson takes an equally—if not more—morbid view of racial identification. To Robinson, race consciousness buys into a flawed structure in which “we internalize race’s limitations—self hatred, alienation, and segregation.” The implications of living within the “limitations” of race are especially troubling for persons of color. According to Robinson, race consciousness breeds a culture of inferiority, victimization, and helplessness among persons of color. If Robinson’s claims are true, then progressive movements like anti-racism should not fight for the legal and political recognition of such a psychologically destructive construct as race.

Id. at 1463 (citations omitted).

232. See GOSWAMI ET AL., *supra* note 5, at 10 (stating that quantum physics argued for a philosophy of monistic idealism that posits that “everything (including matter) exists in and is manipulated from consciousness.” Thus, matter is secondary to consciousness.); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel Barnes trans., 1994) (arguing for an existentialism that depends on a relationship between nonbeing and being, an awareness of consciousness and thus absolute freedom, and an end to self-deception and bad faith).

233. See Tim Folger, *Does the Universe Exist If We’re Not Looking?*, 23 DISCOVER MAG. (June 2002), available at <http://www.discover.com/issues/jun-02/features/featuriverse/> (last visited May 22, 2005). Andrei Linde, emeritus physicist at Stanford University, states that:

of even our most vile, hated experiences. We must therefore remember the co-creative power that perforce attends every human being. We must remember that as co-creative human gods, we have the power to make or destroy beautiful worlds, and with that power comes the most awesome personal responsibility.

Race Crits, even progressive ones like Dorothy Brown, do not truly believe in human agency. She believes in lesser humans of lesser gods, ones who perennially live under the welter of *white* racism. As such, she cannot imagine a world in which minorities can co-create a racism-free world by examining their own core beliefs.²³⁴ Derrick Bell ventured down this road in his *Scroll* parable, but given his eternal pessimism, he contorted the parable into yet another tale of the failure of liberal democracy and the power of *white* racism.²³⁵ Although Brown does not ask us to jump off the cliff of pessimism, she tells us that when bad things happen to minorities, *white* structural oppression did the dirty deed. Given her limited, narrow view of human agency, Brown must perforce limit her real inquiry to two questions.

First, does the law subordinate the interests and concerns of racial and ethnic minorities? Second, if so, can Race Crits proffer a remedy?²³⁶ In addressing these questions, her remedy requires law students to appreciate social context. This context argues for a structuralist path to racial justice. By structuralist, she appears to mean that social practices control and inform a person's experiences and opportunities. Yet, civil and human rights advocates, known and unknown, have sued politically and legally for justice concepts like racial and ethnic equality.²³⁷ Did these advocates have agency? Despite the daunting presence of racism, especially the bru-

[C]onscious observers are an essential component of the universe and cannot be replaced by inanimate objects. The universe and the observer exist as a pair. . . . You can say that the universe is there only when there is an observer who can say, Yes, I see the universe there. . . . In the absence of observers, our universe is dead.

Id.

234. Cf. GIDDENS, *supra* note 13, at 5 (“[S]ocial life is governed by dark currents outside the scope of actor’s awareness, [and advocates of a reductive theory of consciousness] cannot adequately grasp the level of control which agents are characteristically able to sustain reflectively over their conduct.”).

235. See Bell, *supra* note 12, at 68–72.

236. See Brooks, *supra* note 19, at 3 (explaining that Race Crits pursue two inquiries: “(1) whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns of racial minorities and (2) if so, how is this problem best remedied?”).

237. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2d ed. 2004); J. CLAY SMITH, *EMANCIPATION* (1993).

tal variety that forms so much of white supremacy's lore, these advocates risked their lives to promote justice.²³⁸

Never addressing these heroic agents, Brown simply draws us toward structuralism, in which *white* racism operates consciously or otherwise to dominate racial and ethnic minorities.²³⁹ In this structuralist world, law becomes the handmaiden for the ignorant and the evil. Brown organizes *Critical Race Theory* to associate experiences that more than suggest that *white* racism, unconscious racism, or *white* race consciousness can best explain what happens in the substantive materials and critical notes. In this way, Brooks sets out CRT's framework and methodology. Lawrence introduces the students to unconscious *white* racism and the degree to which the cultural meaning test appropriately redresses it. Lastly, Crenshaw illustrates how *white* race consciousness exists today, a mindset that rationalizes *white* domination over blacks and that forges a class alliance between poor whites and elite whites.²⁴⁰ In *Critical Race Theory*, Brooks, Lawrence, and Crenshaw become the unspoken organizing principles for this pedagogical mission. Through these very important works, *white* structural racism, whether visible or invisible, wafts heavily throughout *Critical Race Theory*.

By overlooking the more difficult questions about human agency and by emphasizing *white* structural oppression, *Critical Race Theory* does not teach law students to "know" and to redress racism and racial discrimination. Depending on the law student, Brown's approach may achieve three goals: provoke guilt; create a greater sense of personal awareness about the degree to which racial and ethnic minorities face real, social challenges; and find a real disciple of CRT and its liberal agenda. Yet, these students will not have a complex understanding of the recurring micro-practices of human agents and the reproduction of cultural life. Right now, these law students have been equipped to examine how whites have directly and indirectly injured racial and ethnic minorities. This examination draws them back to *white guilt* and *black innocence*, *white victimizer* and *black victims*. Yet, through direct experience

238. See ANTHONY GIDDENS & CHRISTOPHER PIERSON, CONVERSATIONS WITH ANTHONY GIDDENS: MAKING SENSE OF MODERNITY 78 (1998) ("Even someone who is threatened by a bullet from a gun remains an agent in a philosophical sense."). See generally JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000).

239. GIDDENS & PIERSON, *supra* note 238, at 77 ("[S]ociety is a structured phenomenon and the structural properties of a group or a society have effects upon the way people act, feel and think.").

240. See Crenshaw, *supra* note 9, at 27; see also Janet E. Helms, *Toward a Model of White Racial Identity Development*, in BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE 49, 54 (Janet E. Helms ed., 1990) ("One of the results of this racial status is that . . . even if one has few resources oneself, as long as one has White skin in America, one is entitled to feel superior to Blacks. This sense of entitlement seems to be a basic norm of White society.").

and newspaper accounts, law students have an awareness of social life too. In the absence of white oppressors, racial and ethnic minorities make decisions that negatively impact their lives.²⁴¹ Brown overlooks the micro-practices of blacks so that she can instead emphasize *white* structural oppression.

Accordingly, in the Sacred Way of Tibetan CRT Kung Fu, structuralism cannot grant students the mystical insight of the Shadow. Structuralism marginalizes, if not rejects, a human agent's experience. Structuralism, thus, becomes an organizing framework. Existing prior to our experience, structuralism shapes and narrows, but it cannot help law students "know."²⁴² To the extent that they "know" that *white* racism is present, structuralism tells them that an external, objective force must exist to explain income and wealth gaps. Oliver and Shapiro write that slavery, Jim Crow, and racialized segmentation explain income and wealth gaps between blacks and whites.²⁴³ As such, structuralism argues that social life dictates the moment-to-moment lives of racial and ethnic minorities. For example, Crenshaw argues that black people did not consent to a liberal legal ideology. Rather, racial domination coerced black participation. Accordingly, "black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others; moreover, the ideological source of this coercion is not liberal legal consciousness but racism."²⁴⁴ In the end, *white* racism explains black life, a social experience completely causally related to the choices that racial and ethnic minorities make second to second, minute to minute.

By presuming *white* structural oppression victimizes minorities, the Sacred Way of Tibetan CRT Kung Fu must guilt law students, especially white students, into not asking critical, embarrassing questions about minorities' debilitating choices and behavior.²⁴⁵ Rather, Brown requires them to start with the idea that *white* racism is hegemonic and totalizing. This idea legitimates black subordination as socially and historically inevitable.²⁴⁶

241. See generally Bourgois, *supra* note 82, at 6–11 (explaining that crack dealers and their sellers deliberately engage in violence, even against their innocent neighbors, as a way of promoting their drug sales and establishing a violent, aggressive reputation).

242. See ORNSTEIN, *supra* note 6, at 32 ("[W]hat we actually experience . . . is the category which is evoked by a particular stimulus, *not* the occurrence in the external world.").

243. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

244. CRITICAL RACE THEORY (Crenshaw et al. eds.), *supra* note 8, at 103, 110.

245. See, e.g., Patrick Welsh, *Takin' It Back from the Street*, FORT WORTH STAR-TELEGRAM, July 4, 2004, at B5 (stating that Cosby believed that "some 'lower economic' African American parents had the wrong values—that they'd rather buy their kids expensive sneakers than introduce them to Hooked on Phonics.").

246. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416–17 (1980) ("Narrative habits, patterns of seeing, shape what

It excludes blacks from any real, personal responsibility. And it degrades the Shadow's truly mystical insight into a lesser way of "seeing"—CRT Kung Fu. Thus, Race Critics like Brown must ask: Who has a duty to eradicate the effects of racism? The answer: whites!²⁴⁷ "The struggle of blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology in order to transform the experience of domination."²⁴⁸ Whites have this burden because, unlike minorities, they have agency and can affect systemic change.

However, Crenshaw casts blacks as both victims and agents, but she fails to link human agency (i.e., choice) and victimization (i.e., perception of effects). By making choices, human agents give themselves permission to experience the effects of their daily practices (i.e., blow back), and with these practices and experiences, agents can reinforce the social life in which they already believe. Rather than cast blacks as totally free human agents, Crenshaw argues that blacks must use liberal ideology as a pragmatic strategy. As victims, they must struggle to end *white* race consciousness. By using this strategy and by struggling against racism, Crenshaw impliedly suggests that blacks have human agency (i.e., choices). They can consciously alter their day-to-day practices so that they can pursue their own ends. In this way, blacks can co-create different personal experiences and social realities.

Unfortunately, Crenshaw ignores these implications. Having committed herself to CRT's structuralist thesis, she'd prefer to cast minorities as the Other. Having committed herself to *white* structural oppression, Crenshaw argues that *white* race consciousness dominates black life, casting blacks as inferior to whites (racial victims), denying them rights (liberal victims), and requiring them to struggle for inclusion (structural victims). By relying on Crenshaw as an organizing principle for *Critical Race Theory*, Brown endorses Crenshaw's thesis.

In this way, Brown's Sacred Way of Tibetan CRT Kung Fu cannot truly achieve CRT's liberal freedom. Recent works have attempted to complicate ways of thinking about and doing CRT so that CRT can get practically closer to achieving this goal. For example, Robert Williams and

we see and that to which we aspire. These patterns of perceptions become habitual, tempting us to believe that the way things are is inevitable.")

247. For a publication that directly implicates whites in the racial oppression of blacks and other minorities, and in the ending of racial discrimination, see PAUL KIVEL, *UPROOTING RACISM: HOW WHITE PEOPLE CAN WORK FOR RACIAL JUSTICE* 2 (1995):

Racism is often described as a problem of prejudice. Prejudice is certainly one result of racism, and it fuels further acts of violence toward people of color. However . . . racism is the institutionalization of social injustice based on skin color, other physical characteristics, and cultural and religious difference. White racism is the uneven and unfair distribution of power, privilege, land and mineral goods favoring white people.

248. Crenshaw, *supra* note 9, at 1386.

Eric Yamamoto proffered a critical practice or praxis.²⁴⁹ In *Vampires Anonymous*, Williams challenged Race Crits to use clinical legal education to arm students with critical, practical skills so that they can learn to empower minority communities.²⁵⁰ In *Interracial Justice*, Yamamoto urged Race Crits to join leagues with political lawyers and community activists so that together they can pursue an agency that promotes interracial justice.²⁵¹ Although these approaches expand the ways of doing CRT, Williams and Yamamoto still base their arguments on structuralism, on a world in which external, objective forces work tirelessly against minorities, ultimately keeping them disempowered or positioning them so that they fight each other or victimize themselves.²⁵² Undoubtedly, by applying CRT methodology to law school's first-year curriculum, Brown's Sacred Way of Tibetan CRT Kung Fu critically explores apparently neutral legal concepts like justice and legal process, so that law students can free themselves from constraining analytical paradigms.²⁵³ Yet, is this potential freedom sufficient to say that Brown's *Critical Race Theory* abandons the old ways for new paradigms? No, it is not.

Therefore, Brown's *Critical Race Theory* leaves us bereft of new methodological approaches. We have no radicalizing tools so that we can explore macro-systems and micro-practices. For example, Brown chooses readings that reinforce Brooks', Lawrence's, and Crenshaw's paradigms, so that law students inescapably conclude that *white* hegemonic oppression remains the principal cause of minority and ethnic personal experiences and social realities. In this way, Brown never invites law students to question how minorities and women choose to live. Her injunctive thus remains: "It is the structure!" After law students read *Critical Race Theory*, where will they be? They will be in the same impenetrable forest where Race Crits blindly wander, and while they ceaselessly wander in this forest, they will "see" the fallen trees of white victimizers and black victims, all of which frustrate how racial and ethnic minorities have always used

249. See generally Robinson, *Human Agency*, *supra* note 4 (critiquing Williams' and Yamamoto's theories as incomplete, but more sophisticated versions of CRT's structuralism in which ordinary people like minorities are not viewed as human agents who use their consciousness to co-create their experiences, including racism, oppression, and victimization).

250. See generally Robert Williams, *Vampires Anonymous and Critical Race Praxis*, 95 MICH. L. REV. 741 (1997).

251. See generally YAMAMOTO, *supra* note 83.

252. See generally Robinson, *Human Agency*, *supra* note 4.

253. Cf. Kathryn Abrams, *Race and Races: Constructing a New Legal Actor*, 89 CAL. L. REV. 1589, 1589 (2001) ("[O]ur teaching helps students to 'think like lawyers.' Some scholars have theorized [about] this thought process more specifically . . . about the kinds of intellectual habits engendered through rigorous exposure to the case method, or the kinds of attitudes toward hierarchy produced by the substance and method of legal education.").

their human agency to sojourn to justice, liberty, and peace. *Critical Race Theory thus frustrates law students as much as it educates them.*

As a result, Brown's *Critical Race Theory* is neither insidiously heretical nor shockingly controversial. Its novelty lies in its mission: expose the first-year curriculum to CRT's liberal, analytical inquiry. Apart from her mission, CRT is illusory radicalism at best. At worst, CRT permits young, career-oriented law professors simply to pay homage to CRT's traditional methodology of *white* structural oppression, so that they can add one more page of banal, creative turns to the wealth of Race Crit legal scholarship. Yet, none of them intends to bring down the proverbial master's house. None of them critically questions the degree to which minorities have created safe harbors in their minds for debilitating concepts like race, *white* racism, racial identity, and race consciousness.²⁵⁴ Brown's Sacred Way of Tibetan CRT Kung Fu could have taken Race Crits and law students beyond the fallen sequoias of CRT's traditional methodology and deeply into the fictive mystical teachings of Cranston's Tibetan Masters. Unfortunately, like other Race Crits, Brown's politics about race, *white* racism, and personal responsibility limit her to the well-worn path through CRT's dark, obscure forest by which racial and ethnic minorities blame whites for their personal experiences and social realities.²⁵⁵ In this sense, Brown is not a heretic, and *Critical Race Theory* is a liberal project.

254. Race Crits like Paul Butler, for example, promise to bring down the master's house by faulting white structural oppression for the choices that racial and ethnic minorities make. See Butler, *Jury Nullification*, *supra* note 26, at 680 ("Through jury nullification, I want to dismantle the master's house with the master's tools. My intent, however, is not purely destructive; this project is also constructive, because I hope that the destruction of the status quo will not lead to development of noncriminal ways of addressing antisocial conduct."). By faulting whites, Butler has not asked minorities to reconstruct themselves. If they have the power to rob and steal and if robbing and stealing affect others, then they have the power to co-create a better way for themselves by taking personal responsibility for their actions. Taking this responsibility must be prior to a call to rework the system. By this level of responsibility, the system in which we all live, and which could not exist without us, would perforce change because each of us has changed. In this way, Butler and other Race Crits have mistakenly placed greater emphasis on so-called external, objective forces like *white* racism because they do not realize that all external experiences first flow out of and exist within each of us. Cf. ORNSTEIN, *supra* note 6, at 47–48 ("Previous experience with objects and events strengthens personal category systems as it does a scientific paradigm. . . . [Thus] what we actually experience . . . is the *category* which is evoked by a particular stimulus, *not* the occurrence in the external world."). Therefore, Race Crits cannot destroy the master's house without first recognizing that the master's house exists within each of them, and to destroy this house, they must first commit to destroying the degree to which their thoughts, imaginations, words, feelings, and actions contain the slightest sense of self-loathing. We encounter the simplest, first evidence of self-loathing when we experience ourselves and others through race, racial identity, and racial consciousness.

255. See ORNSTEIN, *supra* note 6, at 32 ("We develop stereotyped systems, or *categories*, for sorting input. The set of categories we developed is limited, much more limited than the input. . . . If we categorize a [white] person as 'aggressive,' [or as racist], we then consistently

In *Critical Race Theory*, Brown tells law students that structures and systems matter. Treating structure and systems as if they originate out of thin air or only at the machinations of whites, she never urges law students to analyze why minorities also put themselves in socially difficult positions. Why do minorities rob their neighbors? Why do they kill each other? Why do they sell crack in their neighborhoods? Why do they urinate or defecate in public housing elevators?

In the following section, I will illustrate why concepts like white victimizers, black victims, or *white* structural oppression actually prevent Race Critics like Brown from asking difficult, but ever important, questions about human agency and personal responsibility. From my point of view, ordinary people have always had real, meaningful agency. Society steers us away from our co-creative powers so that we can serve social ideas that limit us to race, gender, class, sexual orientation, and national security debates. During this steering, we throw our very powerful co-creative energies into thoughts, beliefs, feelings, images, actions, and words that enrich the wealthy, the politicians, and the disquieted humans who seek world domination. By examining micro-practices, we can learn how ordinary people co-create poverty, disenfranchisement, and individual and collective suffering. Without human action that aggregates into social, systemic, or structural practices, the rich and powerful in corporate America and Congress could never dominate, manipulate, and control people. Through ignorance of our inherent co-creative powers, we place ourselves at their disposal. We flock to fear-based news programs. We support cultural programming like television that positions men against women.²⁵⁶ We endorse social violence by directly and indirectly supporting wars for wealthy, powerful dynasties.

By avoiding heresy, ignoring agency, and blaming *white* structural oppression, Brown and other Race Critics like her have not pushed us to places of intellectual, emotional, and personal discomfort. We know the old saw: the white man did it! Accordingly, *Critical Race Theory* leaves us comfortable. But have we grown? With this emotional salve, we remain pseudo-intellectuals, ever enslaved to power robbing concepts like *white* victimizers and *black* victims. In the end, we spend our valuable energy looking outwardly for the culprit who never ventures too far beyond our innermost debilitating thoughts.

tend to sort all his actions in terms of [these] categor[ies]."); see also Wilkins & Gulati, *supra* note 29, at 70 ("To the extent that white partners think (consciously or unconsciously) that 'we had a [black] once and he didn't work out,' the chances of any other black lawyer having a successful career at the firm are correspondingly reduced.").

256. KIVEL, *supra* note 247, at 53 ("Many of us in the United States today are afraid. We worry about crimes, drugs, our children's future and our own security. Our fear is a result of many economic, social, political and personal factors. It is also linked to violence in news media, TV and the movies.").

B. Co-Creating Racial Oppression: Crack Dealers
in Spanish Harlem

1. Crack Dealing in Spanish Harlem

In Spanish Harlem at a particular corner, Gato sold crack. His clients were locals, white collar nine-to-fivers, or outsider *blanquitos*.²⁵⁷ He worked for a local *botanica* (or crack house). Selling crack required reputational strength. To sell effectively and to protect the product, Gato cannot be a "pussy." When faced with threats or attempted robberies, he must defend himself and the crack. Without this courage, Gato cannot sell, and he might not survive. So when Gato faced his former partner to whom he owed marijuana seized in a prior week's drug bust, he stood his ground, taking a beating that included kicks as well as smashes with a baseball bat.²⁵⁸ Although beaten, Gato was not a "pussy," thus suffering a fallen reputation, risking future *botanica* product to strong-arm holdups, and losing the street juice to sell crack.

Not perceiving himself as a passive victim of structural transformations, Gato willingly chose the crack trade. Yet, he was not alone. His associates were Chino, Bennie, and Julio. They lacked material means, and they knew it. "They do not passively accept their fourth-class citizen fate."²⁵⁹ They doggedly and ruthlessly struggled to make it. In today's world, Gato, Chino, Bennie, and Julio were like investment banker yuppies, working hard, earning money, demanding dignity, and leading meaningful lives. Bourgois writes: "Tragically, it is that very process of struggle against—yet within—the system which exacerbates the trauma of their community and which destroys hundreds of thousands of lives on the individual level."²⁶⁰ In this sense, Gato, Chino, and Julio actively used the crack trade to survive, even if they knowingly contributed to their self-destruction, to the current misery of their neighbors, to the death of fellow competitors, and to the destruction of their community.

In choosing to sell crack, Gato, Chino, Bennie, and Julio turned unemployment, limited formal education, intolerance for lower wages, and personal anxiety into crime, abuse, and violence within their community. In taking this self-destructive route, they fed their families, they didn't face ethnic discrimination, and they overcame unemployment. It was not that they could not always find work. When they faced elitism, ethnic hostility, or simply hard work, ordinary people like Gato, Chino, Bennie, and Julio

257. Bourgois, *supra* note 82, at 8 ("They make fun of friends and acquaintances—many of whom come to buy drugs from them—who are still employed in factories, in service jobs, or in what they . . . would call 'shitwork.'").

258. *Id.* at 6.

259. *Id.*

260. *Id.* at 7.

chose to quit.²⁶¹ After they quit, they felt proud that the “white Man” was not exploiting them. Yet, they felt “like fucking assholes for being poor.”²⁶² Out of some sense of resistance or pride, they worked as baggers or delivery boys for the *bodegas*. In addition to these ill-paying jobs, they had held “the least desirable [jobs] in US society.” On this point, Bourgois writes: “Virtually all of these street participants have had deeply negative experiences in the minimum-wage labour market, owing to abusive, exploitative and often racist bosses or supervisors. They see the illegal, underground economy as not only offering superior wages, but also a more dignified work place.”²⁶³

Unlike jobs in the formal economy, crack dealing carried dignity and respect. For example, Gato worked for the ASPCA. He cleaned out gas chambers after strays were killed. Bennie got fired from a security job on the violent ward for the criminally insane on Wards Island. Chino had been fired from a job where he installed high altitude storm windows on skyscrapers after he suffered temporary blindness in his right eye. After his injury, Chino learned that his boss, who had illegally hired him through a corrupt union official, paid him half the union wages, pocketed the other half, and neglected to take out health insurance for him. “Chino . . . claimed that his foreman from Pennsylvania was a ‘Ku Klux Klanner’ and had been especially abusive to him as he was a black Puerto Rican.”²⁶⁴ Before selling crack, Julio was an off-the-book messenger for a magazine that catered to New York yuppies. While on this job, Julio became addicted to crack, began selling rocks from his home, and finally got thrown out by his wife who had just given birth to his son. Julio quit his messenger job so that he could steal car radios two hours at night in the very neighborhood where he worked for 10 hours as a minimum wage messenger. After a near arrest by police, Julio begged his cousin for a job selling crack, and after getting renewed responsibility, success, and prestige from selling crack, Julio kicked his “crack habit and replace[d] it [with] a less expensive and destructive powder cocaine and alcohol habit.”²⁶⁵ In each case, Gato, Chino, and Julio reclaimed their dignity and respect by entering the crack dealing trade.

In the crack or underground economy, ordinary people like Chino and Julio can find equal employment opportunity and respect. By choosing this career, they formally opted out of legal society, a place where they can suffer maltreatment and exploitation. Maltreatment meant ethnic slurs. Exploitation meant “shit work” for low wages.²⁶⁶ And so by selling crack they earned crazy money, and they garnered dignity. Bourgois states:

261. *Id.* at 8.

262. *Id.* at 7.

263. *Id.*

264. *Id.*

265. *Id.* at 7–8.

266. *Id.* at 8.

“people choose ‘hoodlum’ status in order to assert their dignity at refusing to ‘sling a mop for the white man.’”²⁶⁷ He goes on to say:

Employment—or better yet self-employment—in the underground economy accords a sense of autonomy, self-dignity and an opportunity for extraordinary rapid short-term upward mobility that is only too obviously unavailable in entry-level jobs. Opulent survival without a “visible means of support” is the ultimate expression of success and it is a viable option.²⁶⁸

Although some ordinary people like Chino or Julio rejected the legal society because they felt exploited by structural forces, many did not. They chose the crack industry because this work reinforced what they had already believed about themselves. They admitted to laziness. They laid claim to irresponsibility. After quitting their legal jobs, they pursued good times on the street. Moving in and out of legal society, some used crack money to subsidize their downtimes. Without other ways of earning a living, this utilitarian justification for entering the crack economy provided high school dropouts with viable upward mobility. It was their Horatio Alger myth. Exploiting crack clients, these utilitarian dealers were aloof to their buyers, even if they had drug dependency problems. Chino considered himself just this sort of dealer who often chanted at his regular customers: “Come on, keep on killing yourself; bring me that money; smoke you to death; make me rich.”²⁶⁹

Convinced that legal society failed them, ordinary people like Gato, Chino, Bennie, and Julio used the crack economy to deliberately advance themselves. They sought a greased path to their version of wealth. While they had some sense of structural oppression and ethnic discrimination, they chose to use crack, even though it is a self-destructive option. With the power to choose, ordinary people are not passive, unreflective victims. Bourgois describes them as “the victims of long-term historical and structural transformations.”²⁷⁰

I disagree. Without ever analyzing their plight as flowing out of structural privations, these ordinary people actively and aggressively ignited violence around themselves. Not everyone in Spanish Harlem turned to drugs. Rather, these particular ordinary people engaged in “resistance” practices that reinforce “greater oppression and self-destruction.”²⁷¹ By actively and consciously refusing to accept legal society’s roles, wages, and rewards, ordinary people like Gato, Chino, Bennie, and Julio translated

267. *Id.* at 10.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

their so-called struggle into "high crime rates, high addiction rates, and high intra-community violence."²⁷²

In the end, ordinary people like Gato and Chino who chose crack dealing as a micro-practice didn't intend to alter broader social issues like racial discrimination. Rather, they simply intended to cope with their needs based on ways in which they co-created their personal experiences and social realities. In this way, society did not directly and specifically victimize them; they engaged in self-destructive and self-victimizing micro-practices.

2. Autonomy, Mobility, and a Culture of Violent Terror

Micro-practices co-create personal experiences and social realities. These experiences and realities flow from the core beliefs that ordinary people have already accepted.²⁷³ With these core beliefs, ordinary people fashion a set of daily practices (i.e., micro-practices) against which they can harden their biases and ignore irrelevant data.²⁷⁴ Along the way, whether what we do rises to our cognitive awareness, we actively (or passively) participate in the process of cultural reproduction. In short, micro-practices, which sit astride our core beliefs, co-create cultural reproduction.

In this way, through these daily practices and reified beliefs, ordinary people like Gato and Chino actively reinforced their core beliefs, playing the role of worthless Puerto Ricans. Day by day, they reproduced cultural experiences that declared them valueless, hopeless victims. It was not that they held similar, shared values. If asked, they'd probably tell you about different life principles and career dreams. These principles and dreams did not flow perforce out of Spanish Harlem; this community could have re-inforced or given new contours to them. Rather, they flowed out of their "first contact" with parents and other symbolic authority figures.²⁷⁵ In *Spanish Harlem*, Bourgois does not tell us about principles and values of Gato's and Chino's primary environment. As such, we must take caution in drawing a direct causal line from the ugly challenges of Spanish Harlem to the crack dealing and using by Gato, Chino, Julio, and Bennie. After all, as Bourgois points out, many ordinary people in Spanish Harlem don't sell or use crack cocaine.

272. *Id.* at 7.

273. See ORNSTEIN, *supra* note 6, at 35–36 (citing ALDOUS HUXLEY, *THE DOORWAY OF PERCEPTION* (1952)).

274. See GIDDENS, *supra* note 13, at 22 ("As social actors, all human beings are highly 'learned' in respect of knowledge which they possess and apply, in the production and reproduction of day-to-day social encounters; the vast bulk of such knowledge is practical rather than theoretical in character.").

275. Cf. HELMS, *supra* note 240, at 54 ("Vicarious awareness occurs when significant persons in one's life (i.e., media, parents, peers) inform one of the existence of Blacks as well as how one ought to think about them.").

Notwithstanding the clear pressures that larger social practices can place on a community like Spanish Harlem, Race Crits must examine an ordinary person's daily practices and core beliefs, so that we can understand the degree to which their micro-practices reproduce cultural norms that mimic so-called *white* structural oppression. If so, then this racial oppression flows not just from white racists but also from ordinary people who learned to hate themselves, who fear their human potential, and who reproduce features of white oppression through their deliberately chosen words, feelings, and practices. As a result, ordinary people like Gato, Chino, Julio, and Bennie chose their life, and it is a life filled with drug use, sales, violence, and death.²⁷⁶

By deliberately choosing a life of crack dealing and using, ordinary people like Gato and Chino co-created experiences and realities that Race Crits would uncritically attribute to *white* structural oppression. They sought the fastest road to money. For them, as in the larger society, money meant power, autonomy, and mobility. "Besides wanting to earn 'crazy money,' people choose 'hoodlum' status in order to assert dignity at refusing to 'sling a mop for the white man.'"²⁷⁷ To get money, they appeared cavalier about early death or broken lives. Like Enron's Ken Lay, these "Crack Street" dreamers found themselves on the pile of shame, dejection, and failure.²⁷⁸ Without money (or personal power), they endured a "fall," one underscored by greed, drugs, prison, and perhaps actual death. Accordingly, ordinary people like Gato and Chino dealt crack cocaine because this chosen career meant quick cash, personal autonomy, and economic mobility,²⁷⁹ and they reproduced a culture of violent terror as a necessary means to that end. For example, Indio shot his brother in the spine and paralyzed him in a heated fight over crack sales, cementing his violent reputation and assisting his upward mobility.²⁸⁰ Upward mobility required a violent reputation, and this reputation carved out a marketable turf on which ordinary people like Indio profited.

276. Bourgois, *supra* note 82, at 9 (describing how an aggressive, enterprising Indio shot his brother in a battle over sales receipts of crack cocaine, paralyzing him. The shooting cemented Indio's reputation. His workers are superiorly disciplined because Indio will kill anyone over sales if he'll shoot his brother—who later worked for him, selling crack on crutches.).

277. *Id.* at 7, 10.

278. *Id.* at 7.

279. *See id.* at 7–8:

[A]fter a close encounter with the police Julio begged his cousin for a job selling in his crack house. Significantly, the sense of responsibility, success and prestige that selling crack gave him enabled him to kick his crack habit and replace it by a less expensive and destructive powder cocaine and alcohol habit.

280. *Id.* at 9.

Like Indio, Gato and Chino pursued success by dealing crack not because white racists put guns to their heads, but because the "guns" were already in their heads.²⁸¹ To achieve this end, ordinary people like Gato and Chino co-created day-to-day practices that did not require *white* racism. They only required greed and unchecked ambition, a life approach not invented by white Europeans. Mostly, crack dealing like corporate greed flowed from an inner fear, a core belief, that Race Critics ignore, so that they can simply blame *white* structural oppression. With awareness, cunning, and a risk calculus, Gato, Chino, and Indio acquired the taste for selling crack. By seeking out these illegal economic opportunities, these ordinary people were expressing their human agency.

Within this complicated idea of human agency, ordinary people like Gato could declare that they were engaging in the "struggle" or "resistance." Yet, few of them actually cited systemic or structural oppression that drove them through the straits of an unfortunate life.²⁸² In a rather odd way, crack dealers who terrorized their community were the most visible, tangible signs of "external" oppression. For Indio, mobility, power, and autonomy required nothing less than a complete commitment to violent pressure on their competitors, their neighbors, and their consumers. Are they really resistance fighters who openly struggle against large social practices and who willingly risk their lives to throw off white oppression?

In this way, ordinary people like Indio engaged in self-oppressive practices, and they self-administered violence on themselves.²⁸³ Are powerful white men directly or indirectly making ordinary people like Gato, Chino, and Indio sell or consume crack, powder cocaine, or alcohol? Are white men promoting actual or symbolic violence against ordinary people in Spanish Harlem? Moreover, is unconscious racism specifically and factually requiring Gato to sell crack? If these forces were operating invisibly, would a cultural meaning test reveal why Julio chose to consume alcohol to addictive levels? Where resides the *white* structural oppression that beckons Indio to terrorize his neighbors, so that he can ward off equally aggressive competitors, market more effectively his crack product, and keep his sales force appropriately cowed? According to Bourgois, "the physical violence and terror of the inner city are largely carried out by inner city residents themselves."²⁸⁴

In the crack trade, sellers like Julio, Chino, and Indio used violence simply and deliberately to co-create greater opportunities for "crazy money" and market credibility. Rather than pursuing a revolutionary bend against *white* structural oppression, they relied on socially constructed logic that tied brutal violence to successful marketing of crack

281. I attribute this idea to Professor Jack Balkin, Yale Law School.

282. Bourgois, *supra* note 82, at 7.

283. *Id.* at 8.

284. *Id.*

and that resulted in upward mobility. "Drug selling or other illegal activity appear as the most effective and realistic options for getting rich within one's lifetime."²⁸⁵ Although misunderstood by outsiders, upward mobility within the underground economy of crack dealing required effective, systematic violence "against one's colleagues, one's neighbors and, to a certain extent, against oneself."²⁸⁶ When crack sellers like Gato and Chino engaged in commercial violence, they did so as a "judicious case of public relations, advertising, rapport building and long-term investment in one's 'human capital development.'"²⁸⁷ In the crack business, a successful employee knew that she must have an excellent reputation for brutal violence if she intended to make "crazy money."

Ordinary people like Pepito, who ran a string of crack franchises, sought out sellers who had the clear capacity for violence and terror.²⁸⁸ These employees had to hold up under pressure, especially at gunpoint. Crack dens were frequently hit by gun wielding thieves. Unfortunately, Gato had a reputation as a "pussy." Although Gato tried to reclaim his fallen rep, the "rep" plagued him. For example, when thieves confronted him, he did not turn and run. Although his assailant kicked him to the ground twice and beat him with a baseball bat, he simply pranced sideways down the street.²⁸⁹ That year, Gato had been beaten twice. "Gato was not going to be upwardly mobile in the underground economy because of his 'pussy' reputation and he was further cementing his fate with an increasingly out of control addiction to crack."²⁹⁰

A bad reputation differed little from poor discipline and irresponsibility. For example, after a cocaine binge, Chino fled to another state after he could not turn in his night's receipts to his boss, Pepito. Chino also owed Pepito nearly a thousand dollars in bail money.²⁹¹ On the other hand, Julio was a stand up guy; he worked for Pepito, whose *botanica* had been hit twice in one year. Each time, Julio was on duty. With a gun to his temple, a demand for money and crack, and a heightened nervousness, Julio withheld "some of the money and crack that was hidden behind the bogus *botanica* merchandise."²⁹² By withholding some of the money and crack, and by not acquiring a reputation as a "pussy," Julio remained a valuable employee for Pepito's enterprises, and he had an opportunity not only for "crazy money" but also for upward mobility.

In the end, ordinary people like Gato, Chino, Julio, Bennie, and Indio chose crack dealing as a way to have autonomy, respect, and upward

285. *Id.* at 9.

286. *Id.* at 8.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 9.

292. *Id.* at 8.

mobility, and they deliberately co-created and reproduced a culture of violence within their communities. This violence served a commercial, albeit an illegal, end: promote crack cocaine sales. Indeed, they were aware that larger structural forces moved about them. They had cited to racism and ethnic discrimination. They decried limited opportunities for high school dropouts who simply got to mop the white man's floor. Is the white man terrorizing Spanish Harlem with violence? Is he promoting a self-destructive crack addiction? Although outside forces grew and exported cocaine, Spanish Harlem's crack problem remained an organic one. Ordinary people like Pepito, Julio, and Indio were principals in a culture of violence and terror. Through day-to-day activities, a praxis²⁹³ that flows inevitably from their core beliefs, they engaged in micro-practices that reproduced inner stereotypes and internalized messages. These stereotypes and messages did violence to their personhood. Yet, an unknown, unseen, or ubiquitous white "they" did not violate these ordinary people. They violated themselves, all the while giving force and meaning to their limiting core beliefs. Bourgois writes:

For the most part they are not conscious of this process [that links crack dealing, violence, and terror]. The culture of terror becomes a myth and a role model with rules and satisfactions all its own which ultimately has a traumatic impact on the majority of Spanish Harlem residents—who are drug free and who work honestly at poorly remunerated legal jobs, 9 to 5 plus overtime.²⁹⁴

C. The Problem of Unexamined Micro-Practices

Brown's *Critical Race Theory* pays a great deal of attention to large social practices like *white* racial oppression. Thus, Brown's Tibetan CRT Kung Fu fits comfortably within mainstream Race Crit writings. And by constructing *Critical Race Theory* to lie easily within this well-worn groove, Brown has robbed this very important book of its potential as a major contributor to America's race dialogue in the twenty-first century. In this sense, we can kindly sum up *Critical Race Theory's* central message: *white* racism, whether conscious or otherwise, operates against racial and social justice for minorities, women, and immigrants, and the first-year curriculum in American law schools wean law students on a diet of legal reasoning that prevents them from acquiring the Shadow's intuitive knowing about what lurks in the heart of the Law. Nearly all mainstream legal writings by Race Crits say in whole, or part, the very same thing. It

293. See GIDDENS, *supra* note 13, at 19 ("[T]he rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction (the duality of structure).").

294. Bourgois, *supra* note 82, at 9.

is an old saw, and it is one that mainstream Race Critics never tire of promoting. This lyrical beat ignores micro-practices, and likewise, Brown's *Critical Race Theory*, ever loyal to tradition and structuralism, refuses to examine the micro-practices of ordinary people.

While it is quite important to analyze social systems (i.e., macro-systems), it is just as important to examine micro-practices. As I previously stated, these micro-practices aggregate into larger, systemic practices that cross time and space and they make up the everyday details of people's lives.

Consider the social system of American Negro slavery. Can we understand slavery by only examining white masters and overseers? Will Stanley Elkins' notions of slavery²⁹⁵ differ from Frederick Douglass' narrative?²⁹⁶ In order to present a richer context and organic structure of slavery, historians and sociologists critically examine masters, overseers, and slaves.²⁹⁷ They can understand the depth of slavery's oppression by examining what slaves did, tried to do, could do, and could not do.²⁹⁸ A state's slave codes would constitute macro-systems,²⁹⁹ and the local culture and customary practices represented micro-practices. By examining micro-practices, especially a systemic institution that legally categorized human beings as property, we learn about what masters and overseers did daily to advance their interests in economically exploiting and socially dominating blacks. We also learn about what blacks did moment to moment to resist racial oppression whenever they decided that they could do so.

Along the way, race scholars like Race Critics would have to acknowledge that by complying with the master's orders, slaves also reinforced them.³⁰⁰ Yet, resistance and compliance potentially meant biological survival.³⁰¹ With macro-systems in the background, we derive a very complicated picture of slavery when we examine micro-practices. In taking this approach, it is fundamentally misguided to fault slaves who

295. See generally STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1968).

296. See generally FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (1845).

297. See generally EUGENE GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* (1974).

298. See generally JOHN HOPE FRANKLIN, *RACISM IN THE 20TH CENTURY* (2002); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION* (1956).

299. See, e.g., *State v. Hall*, 9 N.C. (2 Hawks) 582 (1823) (Ruffin, J.) ("[T]he master's power must be absolute to render the slave's submission perfect").

300. Cf. GIDDENS, *supra* note 13, at 19 ("[T]he rules and resources drawn upon in the production and reproduction of social action are at the same time the means of system reproduction.").

301. Cf. ORNSTEIN, *supra* note 6, at 24 ("Our 'agreement' on reality is subject to common shared limitations that evolved to ensure the biological survival of the race.").

found ways to adapt. Likewise, it is equally misguided to view all masters as monsters. In a Hegelian sense, masters and slaves needed each other,³⁰² and in a Derridian sense, neither can exist without the other.³⁰³

Most white masters recognized that their power over slaves was contested daily. Unfortunately, by examining slavery simply as a macro-system, as institutional oppression, we cannot appreciate the degree to which slaves, as *homo sapiens*, chose when and where to comply and to resist. By so doing, they directly implicated themselves in the ongoing viability, however tenuous, in their own legal oppression. By refusing to examine micro-practices, few Race Critics can publicly acknowledge that slaves “enslaved” themselves too.³⁰⁴

While macro-systems like slavery and Jim Crow form an important part of our nation’s history, it is equally valuable, if not imperative, that we

302. See GEORG W.F. HEGEL, *THE PHENOMENOLOGY OF SPIRIT* 123 (A.V. Miller trans., 1977) (discussing the Lord and Bondman dialectic).

303. See Crenshaw, *supra* note 9, at 29 (citing JACQUES DERRIDA, *DISSEMINATION* (B. Johnson trans., 1981)) (“These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it.”); cf. PAUL C. TAYLOR, *RACE: A PHILOSOPHICAL INTRODUCTION* 5 (2004) (“Languages are an ambient feature of our social environments in part because they are also interpretive devices: they shape our experiences of the world. To think is more or less to use concepts to categorize and make sense of the objects and events that populate the world.”).

304. See, e.g., Crenshaw, *supra* note 9, at 31–32. Crenshaw discusses symbolic and material subordination. *Id.* By symbolic subordination, she means formal tools that whites used to create materials disadvantages, which reinforced race consciousness in the simplest aspect of social life like separate public facilities for blacks and whites or inferior institutions for blacks. *Id.* at 32. By material subordination, she refers to white discrimination and economic exclusion that devalued blacks’ skills, that segregated blacks to indecent housing stock, and that condemned them to poverty, poor health, substandard health care, and crime. *Id.* These forms of subordination expose macro-systems and micro-practices by whites. Unfortunately, Crenshaw ignores the day-to-day actions by blacks, whether they amounted to success or failure. At any time during Jim Crow, blacks could have risked everything, especially their lives, to end racial segregation. They could have tested the very commitment of whites to legally sanctioned racial segregation by their willingness to pile their bodies in the public square. Some blacks underscored their commitment to equality with their lives. *Id.* Growing up under Jim Crow, most southern blacks knew the cost of violating the public and private codes that buttressed white supremacy. Emmett Till, a kid from Chicago, learned this lesson violently. Are blacks thus implicated in Jim Crow’s then ongoing power? Cf. ROBERTS, *PERSONAL REALITY*, *supra* note 3, at 4:

[T]he world . . . is a reflection of what you are, a reflection not in glass but in three dimensional reality. You project your thoughts, feelings, and expectations outward, then you perceive them as the outside reality. When it seems to you that others are observing you, you are observing yourself from the standpoint of your own projections.

examine the micro-practices of the Civil Rights movement.³⁰⁵ As I have already argued, micro-practices flow out of our core beliefs, and these beliefs inform what we feel, think, say, do, and imagine. With these powerful elements of the co-creation principle, we co-create our personal experiences and social realities. Thus, through examined micro-practices, Race Critics can begin to appreciate that ordinary people also co-create experiences and realities. Born into a specific social and historical milieu, ordinary people lend their very powerful co-creative thoughts to dynamic social institutions like slavery, Jim Crow, and poverty. They also change them. By lending their very powerful co-creative powers to the social construction of reality, ordinary people have never truly been victims. As human agents, they are willing or unwitting participants.³⁰⁶ To this degree, ordinary people and elites are equally positioned, more or less, to effect meaningful change in their lives and in their social context.³⁰⁷

By revealing that ordinary people are powerful human agents and by jettisoning the intellectually indefensible idea that minorities are victims, Race Critics like Brown liberate themselves and their consciousness. Having jettisoned a victim's consciousness, Race Critics would be compelled to examine their micro-practices so that they could discover the interstices in their own lives where liberty, freedom, transformation, and evolution have always existed. This examination perforce encourages them to critique their own core beliefs (e.g., race consciousness), and they would perhaps acknowledge the role that these beliefs have played in co-creating their experiences and realities. In the end, by examining micro-practices, Race Critics free themselves, and thereafter they would label ordinary people not as victims but as powerful reality co-creators.³⁰⁸

For example, *Martin v. Wilks* illustrates how ordinary people like blacks and whites co-create social reality. In *Martin*, white firefighters used existing local resources like jobs with the fire department, political officials, economic intimidation, and community beliefs not only to get jobs for which they were perhaps marginally qualified, but also to prevent blacks from applying for and garnering the same jobs.³⁰⁹ In this illustration, jobs are resources, and the process by which whites acquired these

305. See Joe Davidson, *For Blacks, It's Always the Economy, Stupid* (Aug. 22, 2002), available at <http://www.bet.com/articles/1,,c1gb3636-4311-1,00.html> (last visited Mar. 10, 2004):

That's why Black people cannot rely on the natural (defined as the traditional) order of things in America. If we simply relied on things to get better on their own, Jim Crow would still rule. We'd sit at the back of the bus, have no seat in restaurants and be blocked from voting.

306. See GOSWAMI ET AL., *supra* note 5 (discussing the concept of "unconscious seeing").

307. See BRADEN, *supra* note 92, at 25.

308. See generally ROBERTS, *PERSONAL REALITY*, *supra* note 3, at 47.

309. *Martin v. Wilks*, 490 U.S. 755 (1989), reprinted in BROWN, *supra* note 2, at 343.

jobs was rules. At some point, these resources and rules were not equally available to every citizen. Relying on racism, whites rationalized maltreating blacks, and for a time, many blacks begrudgingly endured this treatment.

In this sense, whites and blacks co-created these racist practices, and so until blacks refused to accept this system, everyone knew exactly how things would work. At some very basic level, blacks accepted that rules favored whites overwhelmingly. At another equally basic level, blacks acknowledged that they could not use these resources to the same degree as whites to acquire these precious, prestigious jobs. To this degree, blacks were still actively participating in the systemic practice of racism. They lent their conscious minds to this system that favored whites and disfavored blacks. They too held very powerful core beliefs about the proper, albeit immoral and indefensible, place that blacks would continue to occupy in a white society. Until they decided to challenge this system and its structure (i.e., rules and resources) in a court of law, blacks actively and persistently co-created the very social system that assigned them to a lower, marginal, and violent existence. In this way, blacks and whites co-created racism.

Micro-practices reveal the degree to which the so-called powerless minority and ethnic citizens actually have enormous power to shape not only their personal experiences but also their social settings. In making this point, Race Crits must still account for social systems and the rules and resources on which specific aspects of these systems rely. Yet, for purposes of illustrating the degree to which ordinary people are reality creators, Race Crits must look at micro-practices. At macro levels, major social institutions like the Savings and Loan Industry can implode. Did structural forces produce this result, or was it personal greed and sharp dealing? In either case, human agents, who perhaps suffered from hubris, made bad decisions, and society suffered through its effects. Within these institutions, a micro level exists. In Spanish Harlem, Race Crits will find social practices, and within them, they will encounter ordinary people like Gato and Julio who cannot be different from those executives who brought the savings industry to its knees. It is the Hermetic teaching of "so as above, so as below."³¹⁰ Basically, we learn that the small contains the large and vice-versa.

With this Hermetic teaching in mind, let's return to Bourgois' *Crack in Spanish Harlem*. Crack in Spanish Harlem cannot be a new experience. Not everyone in this community sells or consumes this drug. The Latino dealers in Spanish Harlem do not make this drug. Poppy crops do not grow on the east and lower sides of Harlem. Nevertheless, crack is on the streets of this neighborhood, poisoning the community, and destroying hard-working families.

310. See THE THREE INITIATES, THE KYBALION (1958).

Critical Race Theory's logic would tell us that crack illustrates the degree to which *white* structural oppression undermines minority and ethnic communities. Perhaps, they would argue, it is the present effects of past discrimination. After all, Race Crits would say, minority and ethnic communities would not need to turn to this devastating drug if they had legitimate ways to enter mainstream economies, had access to corporate capital, and had equal opportunities to attend elite institutions like the University of Michigan Law School. Without *white* structural oppression, Race Crits would argue, minority and ethnic communities could not be so easily ravaged by crack. In this way, Race Crits would draw a close causal connection between *white* racism and abusive drug use.

Is it *white* racism or the abusive drug use? *White* racism reveals potential systemic problems. Abusive drug use tells us about how humans may choose to cope with social and personal problems. Abusive drug use cannot flow inevitably from racial discrimination. Not every minority who faces discrimination takes solace in drugs or self-destructive lifestyles.³¹¹ Consequently, *white* racism cannot explain deterministically every micro-practice. Yet, in critiquing the many faces of *white* racism, Race Crits have spent too little ink on the micro-practices of minorities. Perhaps they have vitiated this critique because they did not wish to blame the so-called victim, a concept that appears to limit their critical inquiry. Perhaps they did not wish to give conservative politicians Teflon-coated bullets. Regardless, Race Crits must deconstruct the moment-to-moment choices made by minority or ethnic communities.

Moreover, Race Crits can perhaps show ordinary people where racism appears to work commensurately with their ignorance, and where minorities' micro-practices undermine their mission to improve their lives. In this way, ordinary people can learn how to purge their communities of the ignorance on which racism depends, especially by first purging this ignorance within them. Furthermore, ordinary people can learn how to alter their consciousness that fuels the micro-practices that challenge their integrity.³¹² And so, by asking "Is it racism? Or abusive drug use?," Race Crits can redress systemic problems, and they can cope with Lewis' culture of poverty (e.g., micro-practices).

Yet, would Race Crits sincerely analyze Lewis' culture of poverty argument? According to Bourgois, scholars have not adequately rebutted Lewis' conceptual framework.³¹³ Race Crits have avoided analytically applying this concept to how ordinary people choose to live, fearing perhaps that left or radical scholars would label them traitors, conservatives, or

311. See generally Jerome E. Morris, *Can Anything Good Come from Nazareth?: Race, Class, and African American Schooling and Community in the Urban South and Midwest*, 41 AM. EDUC. RES. J. 69 (2004), available at 2004 WLNR 15292519.

312. "Integrity" means "say what you mean, mean what you say, and then act commensurately."

313. Bourgois, *supra* note 82, at 6.

color-blind progressives.³¹⁴ Under any label, Race Crits may suffer the loss of a community on which they have come to rely. Without such an analysis, Race Crits have chosen to overlook debilitating micro-practices, especially those on which crack dealers relied to carve out a market niche, to defend their market, to avoid the product-risk labels like “pussy” crack dealers, and to impose violence on their neighbors and consumers, so that they can market their “product” effectively.³¹⁵

By looking critically at these practices, Race Crits may discover that the white master and his house do not exist. Outside of the mind, the white master cannot hold sway. Within the mind, he and other equally powerful core beliefs find real, physical existence at the very least in crack-infested communities.

By taking this approach seriously, Race Crits would be required to ask: where then is the white master who controls ordinary people like Gato, Julio, and Indio when they sell crack? Where is the white master who tells dealers to kill ordinary people simply so that they can defend their product? Where is the white master who requires dealers to expose their neighbors to indiscriminate violence? Where is the white master who robs these neighbors of the agency to work with law enforcement officials to end the open drug trade in their communities?

Like storm clouds, these questions suggest disquieting answers, perhaps even intellectual and emotional discomfort. Yet, apart from specific examples of bad experiences in the mainstream economy or self-serving, excuse-making statements, these crack dealers or consumers did not blame white oppressors or racism. They had very little direct contact with white, structure actors who purportedly oppressed them. Rather, these actors existed largely in their minds. Therefore, while social systems existed in the background against which crack dealing took place, Race Crits must critically examine and honestly analyze the moment-to-moment foreground—the place where human action takes place and the stage on which human agency co-creates personal experiences and social realities that, in turn, reveal the highest (or the lowest) images that we hold of ourselves.³¹⁶

314. Some years ago, I presented my thoughts on N'COBRA's radical reparation agenda. Although I endorsed a form of reparation that placed great responsibility on ordinary people, particularly blacks and whites, I specifically rejected N'COBRA's program. Some time after this presentation, Paul Butler and I talked by telephone. He described me as a conservative. I disagreed with him, and I asked him not to label me in this way. Too late, he told me that he'd already shared his views about me with others.

315. See Bourgois, *supra* note 82, at 7.

316. *Id.*:

They see their income and subsequently their identity and the meaning in their life through what they perceive to be high-powered careers 'on the streets.' They ... share symbols which form the basis of an 'inner city street

In *Critical Race Theory*, Brown's Tibetan CRT Kung Fu reorients law students so that they can better "see" how *white* racism orchestrates itself in the lives of ordinary people. However, Brown's version of CRT ignores completely the degree to which ordinary people can (or may be willing to) account for their choices—micro-practices that do not perforce require them to fault *white* racism. As such, Brown's Tibetan CRT Kung Fu must reject Lewis' culture of poverty theory, and she must ignore any active role that ordinary people play in the cultural reproduction of self-reinforcing victimization. In the end, Race Critics like Brown cannot imagine a social world in which ordinary people can alter their lives by taking complete, personal responsibility for how they think, talk, feel, imagine, and act.³¹⁷ On this point, Braden writes:

In the absence of money or privilege, all choices carry equal strength and value. Clearly, navigating our course through the possibilities of life is a group process. In a quantum world there are no hidden deeds, and each action by every individual counts. We are here in the world that we create together.³¹⁸

CONCLUSION: OUT OF THE BOX LOGIC

Brown's *Critical Race Theory* works well within the logic of CRT's structuralism. Within this logic, she uses Brooks, Lawrence, and Crenshaw as organizing principles for the central point: the Law lives in the first-year curriculum, and when professors teach students the technology of legal problem solving, they hide the real, objectifiable, and oppressive effects on ordinary people like minorities. Accordingly, future lawyers leave law school ill-prepared at best to become real agents of change. Thus, if law students can look at social reality through CRT's lens, then they may be able to "see" that huge structures undermine ordinary people's agency, making them victims of social forces over which they have never had real control.

Within CRT's logical box, Brown teaches law students that ordinary people are victimized by social structures. She takes them no further. Like other Race Critics, she sincerely believes that this teaching ushers in the compassion that is missing in doctrinal analyses. She also believes that CRT possesses an unspoken mysticism. Through the Sacred Way of Tibetan CRT Kung Fu, law students can gain the Shadow-like mystical

culture' completely excluded from the mainstream economy and society but ultimately derived from it.

317. Cf. BRADEN, *supra* note 92, at 25 ("Regarded by many to be the root of all technology, prayer, which is the union of thought, feelings, and emotion, represents our opportunity to speak the language of change in our world as well as in our bodies.").

318. *Id.* at 24.

insight of Race Critics. If they abide by the Sacred Way, structuralism will become the peerless lens through which they will "see" how huge structures like law enforcement operate violently against ordinary people. Yet Brooks' eclecticism, Lawrence's unconscious racism, and Crenshaw's *white* race consciousness are simply theoretical ways of "seeing" and "knowing" that grow out of CRT's logic. These approaches organize apparent external, objective stimuli. They make otherwise mute stimuli speak. They are mere presumptions, ones that ought to beckon Race Critics into a deeper, more uncomfortable inquiry.

Unfortunately, Brown's incomplete training in the Sacred Way gets students to "see" the obvious power of a structuralist critique. To be sure, it is quite powerful, even if it is brutishly simple. Newton's philosophy of reality was mathematically simple and scientifically beautiful, but in the world of quantum physics, it has clearly overlooked disconcerting questions. Brown's CRT guides students to an intellectual precipice, where she leaves them to dangle so that they "see" victims but can do nothing for them. In the end, her students remain emotionally curious and intellectually stunted.

CRT's logic rejects any enduring intimacy between structure and agency. Structure masks the human hands that built it and hides the human legs by which it moves. Under the dark shadows of huge structures, human beings purposefully act. Agency, in isolation, tells us nothing about social relations, so we cannot say anything about social life by simply looking at an ordinary person's choices. We must look at them and ourselves and ask why. We must let this "why" lead us to forbidden places, especially if politics has placed the "verboden" sign in front of us. It is through the intimacy of structure and agency that we thus get richer stories out of a specific context, and we begin to learn how ordinary people co-create successes and failures.³¹⁹

Beyond this political, nearly dead logic and with my heretical approach, Race Critics can critically examine institutional practices, and they can interrogate why ordinary people co-create and reproduce social life that intensifies their plight. Along the way, Race Critics would come to see that structural sociology undermines the very liberty they pursue, and it encourages them to reject the power of human consciousness. This sociology is nothing less than a prejudgment that shrouds the very heart on which the Shadow relied to know people's motives and intentions. In this fiction, while in Tibet, Cranston had the power to change his life, and in truth, ordinary people have power over their day-to-day lives.

Unlike the Shadow, Race Critics, who purport to empower ordinary people, cannot yet begin to journey intellectually and emotionally into

319. Cf. Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 987 (2004) [hereinafter Butler, *Much Respect*] ("There is a symbiotic relationship between culture and law. Culture shapes the law, and law is a product of culture.").

the arena of human consciousness and, therefore, they cannot appreciate the degree to which human thoughts co-create personal experiences and social realities. To get to this point, Race Crits must examine their consciousness and their personal powerlessness. This exploration may help them appreciate why they foist these limits *a priori* on ordinary people.³²⁰ Until they undertake this personal odyssey, Race Crits will use CRT's structuralism to ignore ordinary people's agency, keeping them, in their minds, forever victimized and disempowered. Ironically, Race Crits, who supposedly seek to liberate ordinary people, cannot achieve this end unless they have already imagined them as human agents.

In this critical rejoinder, I urge Brown and other Race Crits to use an imaginative, progressive theory of social life, in which structure and agency work intimately to reproduce experiences like racism. To do so, they must think out of the box, a practice that requires Brown and others to violate CRT's logic. Its liberal paradigms constrain "thinking."³²¹ As Thomas Kuhn pointed out, if Race Crits do not think outside of the box, they cannot change CRT's normal science, the existing paradigm by which traditionally-trained scientists cannot see the blatancy of their own flawed premises.³²² By refusing to violate CRT's normal science, Brown's *Critical Race Theory* unconvincingly repeats the argument that the Law and white racial oppression victimize blacks and other ordinary people.³²³ By thinking within CRT's logic, Brown must reject the very human agency that ordinary people use everyday to co-create both success and failure in their lives.³²⁴

Thus, Brown's *Critical Race Theory* is not heretical. It makes none of its followers uncomfortable. By abiding by CRT's logic and its normal science, Race Crits can sleep comfortably at night knowing full well that they have made themselves indispensable to ordinary people, who must depend on them for their personal salvation. After reading Brown's efforts, Race Crits will still believe that inimical structures stalk poor, ordinary

320. See generally ORNSTEIN, *supra* note 6.

321. Martin Heidegger, *Letter on Humanism*, in BASIC WRITINGS 217 (David Farrell Krell ed., 1992):

But what 'is' above all is Being. Thinking accomplishes the relation of Being to the essence of man. It does not make or cause the relation. Thinking brings this relation to Being solely as something handed over to it from Being. . . . Those who think . . . are the guardians of this home.

322. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (1972).

323. See Butler, *Much Respect*, *supra* note 319, at 983–87.

324. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 62 (1984) (explaining that people have experience making important, moral decisions like getting married or having children, and without pondering theoretical paradigms, they simply decide. Rather, they imagine what their lives would be like if they refused to act, and with hindsight, sometimes they were right or wrong. Regardless, "they knew how to do it.").

people, creeping so deeply into their consciousness that society cannot hold them accountable for their daily practices (e.g., black-on-black crime), and in this sense Butler's thesis gets confirmed by Brown's *Critical Race Theory*.³²⁵

Despite her great efforts, Brown has squandered a vital opportunity to nail a Martin Luther-like *Ninety-five Theses* to CRT's university doors. As Luther did in 1517, Brown could have thrown caution to the wind, leaving herself to await the ruling by CRT's councilors of Aschaffenburg, who would label her a heretic. At that point, she would have become The Shadow, a true mystical seer. Rather, for unexplained reasons, she regurgitates CRT's tenets, leaving Race Crits intellectually stale and emotionally comfortable. As a result, she is a CRT Master, and no one has learned anew. Like Luther, heretics violate systems, especially nearly-totally-rejected ones like structuralism, and they reject political paradigms, even so-called progressive, liberal ones like CRT.

In this piece, I am a heretic. After reading and teaching CRT for many years, I find very few heretics among CRT's latter-day saints. Even the most edge-pushing CRT scholarship has, at its core, the idea that whites dominate blacks, that structural oppression robs ordinary people of their personal dignity and undermines their human agency. If Brown wishes law students to "see" beyond traditional legal problem solving, then she must show them that ordinary people reinscribe themselves with a variety of social messages. Under a loose idea of a "first-contact" theory, parents (or society) teach their children "limits."³²⁶ It is not just the teaching; it is also what the child chooses to repeat to herself. In this repeating, we can discover the power of the human voice, the co-creative energy of human consciousness.³²⁷

In Bourgois' *Crack in Spanish Harlem*, we find the worst results of the co-creative power of our human consciousness, and it illustrates what may happen when ordinary people use the power to repeat damaging, self-esteem-destroying messages. Because ordinary people like Gato, Chino, Bennie, Julio, and Indio were not born to sell crack, they must have imagined a very limited, violent, and desperate life, all of which reinforced core

325. See Butler, *Much Respect*, *supra* note 319, at 1004–05 ("Hip-hop culture emphasizes the role of environment in determining conduct, whereas classic retributivist theory focuses on individual choice. In essence, hip-hop culture discounts responsibility when criminal conduct has been shaped by a substandard environment."). Quoting OutKast, Butler illustrates the point: "knowing each and every nigger sellin', but can you blame/The fact the only way a brother can survive the game."). *Id.* at 1005. See generally Butler, *Jury Nullification*, *supra* note 26.

326. RUIZ, *supra* note 58, at 3 ("The adults around us hook our attention and put information into our minds through repetition.").

327. See ROBERTS, PERSONAL REALITY, *supra* note 3, at 22 ("[A]ny idea you accept as truth is a belief that you hold. You must, then, take the next step and say, 'it is not necessarily true, even though I believe it.' You will, I hope, learn to disregard all beliefs that imply basic limitations.").

beliefs about what they could achieve. Thereafter, they engaged in micro-practices, all of which were actions that reinforced their beliefs and reproduced a culture of racial and ethnic oppression. By making the choice to sell crack, Gato and Chino were human agents who devastated their lives and destroyed their community. While macro-structures exist, Gato and Chino victimized themselves by making immediate decisions that would deepen their place in the informal economy from which they could not easily escape. Nevertheless, they felt like victims. They felt the immediacy of economic privations—a lack that overwhelms as much as it suffocates.

Rather than change their ideas about the world, Gato and Julio acted like hopeless victims, choosing to steal car radios and to sell crack. Assured that legal society would reject them, they ignored how crack dealing exposed them to addiction, violence, arrest, jail, and death. Bourgois' *Crack in Spanish Harlem* conjoins macro-structures and micro-practices in the reproduction of the culture of oppression and violence, and his progressive work complements CRT's traditional, structuralist analysis.

In this heretical approach, human agency is real, substantive power. Nothing can supplant this power's positive outcomes unless ordinary people persistently focus their attention on limiting concepts of race, unless they internalize these concepts, and unless they practice them everyday.³²⁸ To this degree, *white* structural oppression does not exist as an independent idea, a thing that lives apart from our thoughts, beliefs, feelings, words, and actions. CRT's normal science ignores micro-practices, and thus Race Critics cannot appreciate how ordinary people have always been integral forces in the cultural reproduction of so-called racial oppression. Consider the following:

When a police officer looked over, caught the shine from the
rim of the Rover

You know his next move (sound of police siren) pull it over
....

It pulls over to the right hand shoulder

328. See Butler, *Much Respect*, *supra* note 319, at 991 n.45. According to Bakari Kitwana:

Hip-hop has a positive impact, but also has a negative impact in terms of these anti-black images and this misogynistic attitude that comes from rappers who sell multi-platinum records. Like Jay-Z. But at the same time Jay-Z offers a message that the society is screwed up, that it is difficult out here, that the issues of unemployment and education are critical issues. The music is contradictory but the messages that society is sending us are contradictory too. I don't think that it is unusual; I think that's how life is.

Id.

Look through the rearview he got his hand on his holster

He had this look "how this black nigga git this car?"

You know these cracker state troopers don't know rap stars.³²⁹

Whether real or fictional, is Grand Puba objectively describing an experience or consciously co-creating one for listeners who may believe that every white police officer will detain them simply because blacks drive nice cars? Behind these words, Puba suggests that *white* structural oppression flows from the state and its law enforcement officials.³³⁰ By implication, black drivers are simply innocent victims who a white police officer never imagines can justifiably own expensive cars. If thousands believe this message, they will co-create negative, hostile contact with law enforcement officials because they expect police officers to disrespect them and to offend their human dignity.³³¹

Under this heretical approach, human agents must treat these expectations as powerful forces in the co-creation experience, and to this extent, ordinary people can appreciate that police officers may be racist and put the fear of illegal stops behind them. Racist does not perforce equate with violent. When human agents venture into society, they must embrace the idea that they are completely safe. Yet, if a police officer stops a minority motorist, this encounter need not escalate into a violent, life-threatening incident. Accordingly, to acknowledge fearful experiences and to place them appropriately in their place, ordinary people not only take full responsibility for their personal experiences and social realities, but also empower themselves in ways that Brown's Sacred Way cannot fathom.

This heretical approach mandates personal responsibility. It is the source of an ordinary person's power. By taking on this level of personal responsibility, ordinary people can co-create peace, love, and joy in their lives. By co-creating in this way, ordinary people, particularly racial and

329. *Id.* at 1011–12 (citing Brand Nubian, *Probable Cause*, on FOUNDATION (Arista Records 1998)).

330. *But see* GIDDENS, *supra* note 13, at 16 ("Power within social systems which enjoy some continuity over time and space presumes regularized relations of autonomy and dependence between actors or collectivism in contexts of social interaction.").

331. See Mark Goldblatt, *What Is Racism?: The Rhetorical vs. Reality*, NAT'L REV. ONLINE, Aug. 5, 2002, available at <http://www.nationalreview.com/comment/comment-goldblatt080502.asp> (last visited May 22, 2005). Goldblatt writes:

Such perceptually correlated disparities are aggravated by the culture of victimization that permeates black communities—a culture dominated, in recent years, by hip hop which, literally and figuratively, drums into the brains of young black people that to be black is to be racially oppressed, and which has largely succeeded, in the case of gangsta rap, in equating pathological behavior and black authenticity.

ethnic minorities, reveal that they have never truly been victims. And by appreciating that they hold the power over whether they can be victimized, ordinary people can choose to alter their micro-practices so that they do not use their human agency to reproduce culturally the so-called experience of racial oppression.³³²

332. See ROBERTS, PERSONAL REALITY, *supra* note 3, at 11 (“You are what happens to you.”).